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Problems in Probate Law: Including a Model Probate Code

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MICHIGAN LEGAL STUDIES



PROBLEMS IN PROBATE LAW

PUBLISHED UNDER THE AUSPICES OF THE UNIVERSITY OF MICHIGAN LAW
SCHOOL (WHICH, HOWEVER, ASSUMES NO RESPONSIBILITY FOR THE VIEWS
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OF MICHIGAN BY WILLIAM W. COOK

MICHIGAN LEGAL STUDIES

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UNREPORTED OPINIONS OF THE SUPREME COURT OF

MICHIGAN 1836-1843

William Wirt Blume, *Editor*

PROBLEMS IN PROBATE LAW: MODEL PROBATE CODE

Lewis M. Simes and Paul E. Basye

The American Bar Association

PROBLEMS IN PROBATE LAW

Including

A MODEL PROBATE CODE

Prepared for the Probate Law Division
of the Section of Real Property, Probate and Trust Law
of the

American Bar Association

by its Model Probate Code Committee
in cooperation with the Research Staff of
the University of Michigan Law School

and

MONOGRAPHS

by

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Preface

THE publication of the Model Probate Code, together with related monographs and appendix notes, serves a dual purpose. It is the report of a committee of the Probate Division of the American Bar Association. It is also the product of a research project carried on by the University of Michigan Law School. Mr. R. G. Patton, in his "Presentation of the Report of the Committee on Model Probate Code," printed elsewhere in this volume, has provided an appropriate preface for this publication in its first aspect. As a product of research, however, some prefatory remarks may be added at this point.

In the fall of 1942 the University of Michigan Law School entered into negotiations with Mr. Patton, as Chairman of the Committee on Improvement of Probate Statutes, of the Real Property, Probate and Trust Law Section of the American Bar Association, whereby the Law School undertook to do the research necessary for the preparation of a Model Probate Code. Professor Thomas E. Atkinson, then of the University of Missouri Law School, had already written his noteworthy articles in the *Journal of the American Judicature Society* on probate reform; the Committee had laid the groundwork for probate research by setting up advisers in various states and by approving a general outline which indicated the scope of the proposed Code.

The general plan of procedure in carrying forward this research project was as follows. The probate statutes of the various states were read and classified by members of the research staff of the Law School. On more difficult points memoranda were prepared, summarizing the applicable statutes or relevant case law. Monographs were also prepared

by members of the research staff on some of the most basic topics. Preliminary drafts of portions of the proposed Model Code were prepared and mimeographed and were distributed to members of the Committee and to other persons whose comments might prove valuable. Conferences were held from time to time,—sometimes of the entire Committee and sometimes of the sub-committee on drafting,—at which these drafts were criticized and revised. Ten tentative drafts were prepared and criticized prior to the final draft which is printed in this volume. Besides the five monographs which appear as a part of this volume, many memoranda of statute or case law, which were prepared as a part of the research incident to the Code, are published herewith. The latter appear as Appendix A to the Code.

While I assumed responsibility for the research and preliminary drafting incident to the Model Code, much of this was done by other members of the research staff of the Law School. Mr. Paul E. Basye, as Research Associate, for a period of approximately a year devoted his entire time to the work of the Code, drafting many sections as well as participating in numerous aspects of the research, and since that time he has continued to assist in the work connected with the Code. Professor Thomas E. Atkinson, in addition to cooperating actively in the work of the Committee from the beginning of the movement in 1940 until the final report of the Committee in 1945, came to Ann Arbor in the summer of 1945 as Visiting Research Professor in the University of Michigan Law School and for a period of six weeks devoted his entire time to the Model Code. During that period, he drafted much of the division of the Code concerned with guardianship, and participated in the final revision of the entire Code. Throughout the period of three years during which the University of Michigan participated in the project, Miss Elizabeth Durfee, Research Assistant of the Law School staff,

has been assigned to this research. Most of the appendix notes on the Code were prepared by her. She also collected and classified materials in connection with the preparation of the monographs entitled "The Organization of the Probate Court in America," "The Administration of a Decedent's Estate as a Proceeding in Rem" and "The Function of Will Contests." I am glad to acknowledge here the great assistance rendered by these services.

No series of acknowledgments would be complete without a reference to the financial assistance for this research project which has been provided from gifts to the University of Michigan by the late William W. Cook. Without these funds the research would have been impossible. They have provided salaries for members of the research staff engaged in the project and have made possible this publication.

It must not be supposed, however, that the project was without valuable advice and assistance from persons who are not on the research staff of the Law School. First of all, recognition should be made of the work of Mr. R. G. Patton who, as chairman of the Committee, cooperated with the research staff throughout the period in which the research and drafting were in progress. In addition to the advice of members of the Committee on Model Probate Code and state advisers appointed by Mr. Patton, the counsel of other experts on various branches of probate law was sought. Specifically, I desire to acknowledge valuable suggestions received from the following: Dean Alvin E. Evans, College of Law, University of Kentucky; Mr. H. R. Pool and Mr. Y. D. Mathes, attorneys on the staff of the Veterans Administration; Hon. Stephen H. Clink, Probate Judge, of Muskegon, Michigan; Hon. Frank L. McAvinchey, Probate Judge, of Flint, Michigan; Mr. H. W. Nichols, General Counsel of the National Surety Corporation, and members of his staff; Mr. Gilbert T. Stephenson, Director of the Trust Research Department,

Graduate School of Banking of the American Bankers Association; Mr. James C. Shelor, Chairman of the Committee on Fiduciary Legislation, Trust Division, American Bankers Association; Mr. D. H. Redfearn, Chairman of the Committee of the Florida Bar Association appointed to draft a new guardianship act; Miss Mary Stanton, consultant on guardianship, of the Children's Bureau, United States Department of Labor; and Mr. Elbridge D. Phelps, of the Cleveland bar.

Mimeographed copies of later drafts of the Model Code were sent to those who requested them, as well as to a selected list of other persons, and criticisms were solicited. All criticisms received prior to the completion of the final draft were carefully considered by the sub-committee on drafting. I am glad to acknowledge the assistance furnished by those criticisms.

A few criticisms were received after the report of the Committee was completed and in process of publication. One of these, prepared by Mr. Nathan A. Wagner, of the Judicial Department of the Fidelity and Deposit Company of Maryland, and transmitted by its Vice-President and Manager, Mr. Wm. H. C. Griffith, to Mr. Walter W. Land, Chairman of the Section of Real Property, Probate and Trust Law, contains suggestions which can be summarized here. First, it is suggested that, in place of the present § 106 of the Model Probate Code, which gives a discretion to the judge in fixing the amount of the personal representative's bond, the following be substituted:

"Except as provided in section 107, every personal representative shall, before entering upon the duties of his office execute and file a bond procured at the expense of the estate with sufficient surety or sureties in an amount not less than the value of the personal estate to be administered plus the probable value of the annual rents, issuance and profits of all the property of the estate; in case real estate is to be sold by

the terms of the will, the amount of the bond shall not be less than the value of the personal estate to be administered, and the value of the real estate to be sold plus the probable value of the annual rents, issuance and profits of all the property of the estate; except that where the person or persons about to be appointed is or are entitled to the whole estate, or where acknowledged consents that a bond be dispensed with or fixed at a reduced amount are executed and filed by all of the persons interested in the estate, the court may dispense with the bond or fix the penalty at such sum as will adequately protect the rights of all creditors." It is also suggested that the Code should include "a provision making it incumbent upon the court to inquire into the amount of the bond at the time the appraisal is filed and to make such order, either increasing or decreasing it, as may then appear necessary in order to comply with the statute." It is further suggested that subsection 118(a) be deleted and that notice be given to the surety of all proceedings pertaining to the administration of the estate. The following recommendations are made as to § 116, which concerns the release of sureties before the estate is fully administered:

"1. That the statute specify by whom the petition for the release of the bond can be filed;

"2. That even if the right to be released is conditioned upon the showing of good cause that the word 'shall' be substituted for the word 'may' in the first line, so that it would read—'For good cause, the court shall before . . . ' It would seem that this would grant the court sufficient discretion but would not permit it to decline to grant the release irrespective of whether or not cause therefor had been shown.

"3. That before the original sureties are released the personal representative shall file a full and complete accounting so that there may be an absolute cutoff of liability between the first and the succeeding sureties."

It is also suggested, with respect to this section, that it be so amended "that the liability of the new bond would be limited to acts and omissions occurring from and after its execution. In the event that for some reason this is not done, . . . that the date from which the new bond is to be liable should be determined by the court at the time it is ordered to be given. . . ."

It would be inappropriate for me to present arguments at this point for the positions of the Committee which are inconsistent with these recommendations. In connection with the question of notice, however, attention should be directed to §§ 67 and 209 as well as to other provisions in the Model Code on this subject.

Since statutory citations play such a large part in the material presented in this volume, a word may be said as to their date. In the comments to the Model Code and in the appendix notes, statutory citations were revised as of January 1, 1945; also, in so far as 1945 amendments were available at the time of going to press, they have been inserted. In each of the monographs, the statutory citations are, in general, brought down to the date on which that monograph was published in the Michigan Law Review.

LEWIS M. SIMES
Director of Legal Research,
The University of Michigan

Ann Arbor, Michigan
January 1, 1946

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PART ONE

MODEL PROBATE CODE

MODEL PROBATE CODE

Prepared for the Probate Law Division
of the Section of Real Property, Probate and Trust Law
of the

American Bar Association

by its Model Probate Code Committee
in cooperation with the Research Staff of
the University of Michigan Law School

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Presentation of the Report of the Committee on Model Probate Code

TO the Probate Law Division, Section of Real Property, Probate and Trust Law, American Bar Association:

Your Committee on Model Probate Code presents herewith its final report, consisting of a Model Probate Code of 260 sections, with introduction and critical comments.

In view of the extent and nature of the task, it may not be inappropriate to recount briefly the history of this project in legislative drafting. During the years 1939 and 1940 the Journal of the American Judicature Society carried a series of articles by Professor Thomas E. Atkinson on probate courts and procedure which was concluded in the issue of February, 1940, under the heading "Wanted—A Model Probate Code."¹ After pointing out a few of the archaic and inconsistent provisions of the codes of some states, Professor Atkinson called attention to the fact that in recent years several states had enacted new probate codes, all of them undoubtedly improvements over their previous codes. The drafting was done by committees, councils or commissions and the new acts indicate the borrowing of provisions from other states. However, as pointed out by the author, it is important for such draftsmen to consult and fully consider the statutes of all the other states so as to select the best ideas and the most appropriate phraseology. He raised the question, is the remedy a uniform probate act; and if so, under whose auspices should it be prepared? He concluded that such an act would be an improvement upon the best of existing probate codes and called

¹ 23 Am. Jud. Soc. J. 183 (1940).

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attention to various organizations which have been interested in the improvement of statutes: The National Conference of Commissioners on Uniform Laws, The American Judicature Society, The American Law Institute, The National Conference of Judicial Councils and the Committees on Improvement in Probate Practice and on Uniformity in Probate Codes, of the Section of Real Property, Probate and Trust Law of the American Bar Association.

At the meeting of the American Bar Association held in Philadelphia in September, 1940, the Section of Real Property, Probate and Trust Law included in its program a discussion of the proposal for a Model Probate Code.² At this meeting of the section the foregoing discussion of Professor Atkinson was reviewed and as a result a committee was appointed which has since then been actively engaged upon the project.

In addition to work by the section's committee, the latter has had the assistance of advisory committees appointed by the state bar associations of most of the states. The initial work consisted in the preparation of a list of proposed general headings of matters which should be included in a Model Probate Code and the order of classification. Most of the consultation was of necessity by correspondence but the committee has held open meetings during the subsequent annual sessions of the American Bar Association. On account of the distance separating the committee from its advisory committees, the initial work proceeded slowly. Nevertheless, by the time of the Indianapolis meeting (1941) there had been compiled a tentative but fairly definite classification of major titles and subtitles.

Having completed this initial work of classification, inclusion and exclusion, the committee was squarely faced with the problem of finding members or others who could give the nec-

² Section Proceedings, 1940, p. 17.

essary time to examining the existing probate statutes of all the states, of selecting from them the best worded sections for inclusion as the section or as an alternative section of the proposed model. The committee had arrived at the same stone wall which has faced state groups charged with the duty of proposing a draft which would be superior to the existing law. It had no members who could spare the necessary time to make the research which the importance of the subject demanded; nor did the committee know of any foundation or endowment to which it might appeal for financial assistance. At this critical point it received the suggestion that the University of Michigan was carrying on a number of legal research projects and that a program might be worked out by which its assistance to the committee could be procured. From that beginning a plan was formulated under which the research could be made under the supervision of our own member, Professor Lewis M. Simes, and, as a result, a Model Probate Code could be promulgated jointly by the section and by the university. Commencing late in 1942, this research has been in progress.

A sub-committee on drafting was set up consisting of three persons: the Chairman, Professor Simes and Professor Atkinson. Mr. Paul E. Basye, now of the San Francisco bar, who was formerly a research associate at the University of Michigan Law School, was subsequently added to the sub-committee. In the preparation of the Model Probate Code, six conferences, either of the sub-committee or of the entire committee, have been held since 1942, four at Ann Arbor, Michigan, and two at Chicago at the time of American Bar Association meetings. In carrying on the research incident to the drafting of the code at Ann Arbor, Professor Simes was assisted for approximately a year by Mr. Basye, as research associate, and for the entire period since the University of Michigan Law School undertook to cooperate in the project by Miss Elizabeth Durfee, as research assistant. During the academic year

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1944-45, arrangement was made for Professor Simes to be relieved of half his teaching duties so that he could devote the remainder of his time to research and drafting in connection with the Model Code. In the summer of 1945 Professor Atkinson was appointed visiting research professor at the University of Michigan Law School for a term of six weeks, and devoted his entire time to the completion of the Model Code.

In addition to the assistance of research staff and state advisers, the committee has had the benefit of valuable advice from other experts. Two members of the legal staff of the United States Veterans Administration gave extensive critical comments on a draft of the subdivision of the code dealing with guardianship, as did also the consultant on guardianship of the Children's Bureau of the United States Department of Labor. Other helpful criticisms were received from experts on suretyship and on corporate fiduciaries, as well as from leading probate judges and other experts on the whole field of probate law.

In presenting this Code as the product of five years of preparation and unremitting toil, it is believed that the viewpoint of no important social group has been overlooked and that the content of every important probate statute now on the books has been considered. It would be too much to say that the Code is free from all imperfection. Yet in presenting it to the Section in its final form, it is the belief of your Committee that either as a code complete in itself, or as a fundamental probate law on which to build a larger legislative superstructure, it can be recommended without qualification to the legislative authorities of any jurisdiction in which probate reform is sought.

Respectfully submitted,
R. G. PATTON, *Chairman*

Introduction

THIS Code is offered to meet the rapidly increasing demand for a coherent, efficient and economical probate system.

THE NEED FOR PROBATE REFORM

In many states an outmoded judicial organization and an inadequate procedure hamper the functioning of probate courts and breed delay and injustice. Even where the legal devices conceived by legislators are reasonably well adapted to their purpose, faulty draftsmanship has rendered probate statutes a prolific source of litigation. Moreover, probate judicial organizations and procedural systems have, in many instances, been built up piece by piece, with little or no regard to considerations of coherence and consistency in the body of the legislation as a whole.

THE MOVEMENT FOR REFORM IN PROBATE LEGISLATION

To eliminate such evils, a movement for probate reform began in this country more than a decade ago, and is still continuing. Already probate codes have been adopted by the following legislation on the dates indicated: Ohio Laws (1931) p. 320; California Stat. (1931) c. 281; Florida Laws (1933) c. 16103; Minnesota Laws (1935) c. 72; Kansas Laws (1939) c. 180; Illinois Laws (1939) p. 4; Michigan Public Acts (1939) No. 288; Nevada Stat. (1941) c. 107. The recent, comprehensive revision of the New York law of decedents' estates should also be noted. See New York Laws (1929) c. 229. At the present time extensive reform in the probate law is under way in a number of other states, and it is entirely possible that the movement may become nation-

wide in extent. To provide an adequate and authoritative guide for such legislation, this Code was prepared.

UNIFORMITY NOT AN OBJECTIVE

This is a model code, not a uniform act. Its objective is not the attainment of uniformity among the several states, but the improvement of probate procedure wherever revision of probate legislation is sought. Primarily, it is intended as a reservoir of ideas, and of acceptable legislative formulations of those ideas, from which legislative committees may draw the framework of new probate codes. Just as a good form book for wills loses none of its value because the draftsman of a will adapts the form to his particular problems, likewise it is believed that this Code will prove no less valuable though it may be thought advisable to adapt its provisions to the judicial organization and legal system of the particular state.

STEPS IN THE PREPARATION OF THIS CODE

Before any part of this Code was drafted, the statutes of all common-law American states were read and classified. Those of Louisiana, being based on the civil law, were only used occasionally. In addition to the study of contemporary statute law, an examination was also made of the case law with respect to particular problems, and of the legislative history of particular provisions. While the probate legislation of the states in which probate codes have been recently adopted has been generally helpful in this connection, older statutes have also sometimes furnished valuable suggestions for the Model Code. This is particularly true in the case of Massachusetts where excellent solutions of many problems were found in well drafted statutes.

While much of the research incident to the preparation of the Code has been preserved only in the form of unpublished memoranda, in a few instances it has crystallized into law review articles. The following are by-products of this research:

Simes and Basye, "The Organization of the Probate Court in America," 42 Mich. L. Rev. 965 (1944), 43 Mich. L. Rev. 113 (1944); Basye, "The Venue of Probate and Administration Proceedings," 43 Mich. L. Rev. 471 (1944); Simes, "The Administration of a Decedent's Estate as a Proceeding in Rem," 43 Mich. L. Rev. 675 (1945); Basye, "Dispensing with Administration," 44 Mich. L. Rev. 329 (1945); and Simes, "The Function of Will Contests," 44 Mich. L. Rev. 503 (1946).

Though a critical, comparative study was made of existing probate statutes, the task was not limited to a selection of the best type found in the statute books. If no satisfactory legislation could be found as to a problem the Code proceeds upon original lines. Extensive litigation on a question was taken as some indication that the rules of law should be clarified. If the subject matter was of a sort which could be satisfactorily dealt with by statute, legislation was attempted even though none existed before. But not infrequently the problem was of a sort which could only be solved by judicial pronouncement and not by statutory rules.

RELATION OF THE MODEL PROBATE CODE TO ACTS PROMULGATED BY THE UNIFORM LAWS CONFERENCE

Recognizing the excellent work of the National Conference of Commissioners on Uniform State Laws of the American Bar Association, it was agreed that, in drafting the Model Probate Code, legislation promulgated by the Commissioners should be incorporated wherever the same subject matter had been dealt with. Accordingly, the following Uniform or Model Acts, promulgated or in preparation, have been incorporated in whole or in part in this Code at the points indicated:

Model Execution of Wills Act, §§ 45 to 50.

Uniform Act Governing Secured Creditors' Dividends in Liquidation Proceedings, § 139.

Uniform Veterans' Guardianship Act, Part IV.

Uniform Powers of Foreign Representatives Act, Part V.

Uniform Ancillary Administration of Estates Act, Part V.

It is also contemplated that when and if a new Uniform Wills Act, Foreign Probated, is promulgated by the National Conference, that also will be incorporated into the **Model Code**. Attention should also be called to the following Acts promulgated by the Commissioners which were not incorporated in this Code, but which have a close relation to it and might prove useful to the draftsman of a probate code:

Uniform Absence as Evidence of Death and Absentees' Property Act.

Model War Service Validation Act.

Uniform Fiduciaries Act.

Uniform Fraudulent Conveyance Act.

Uniform Illegitimacy Act.

Uniform Joint Obligations Act.

Uniform Marriage and Marriage License Act.

Uniform Partnership Act.

Uniform Principal and Income Act.

Uniform Property Act.

Uniform Reciprocal Transfer Tax Act.

Uniform Simultaneous Death Act.

Uniform Trustees' Accounting Act.

Uniform Trusts Act.

ADAPTATION OF MODEL CODE TO LOCAL LEGISLATION—

QUESTIONS OF CONSTITUTIONALITY

In some jurisdictions it will be impracticable to enact this Code without a few modifications to adapt it to local conditions. It will have to be fitted into the local judicial organization; for the scheme presented herein contemplates a probate court which is an integral part of the judicial organization of the state. Great care has been taken to avoid provisions in the Code which may conflict with usual constitutional provisions. Moreover, a reference to such constitutional questions has

been made in a number of the comments. But it is impracticable to discuss or refer to every constitutional provision which might, in one particular state, be in conflict with a provision of this Code. For example, in Illinois it is held that the probate court has no jurisdiction under the Illinois constitution to pass on claims arising out of the torts of the decedent. *Howard v. Swift*, 356 Ill. 80, 190 N. E. 102 (1934); *Gordon v. Bauer*, 373 Ill. 357, 26 N. E. (2d) 110 (1940). In the same state it has been held that a statute which gives the probate court jurisdiction over testamentary trusts is unconstitutional. In *re Estate of Mortenson*, 248 Ill. 520, 94 N. E. 120 (1911). Doubtless it would require a constitutional amendment in some states to abolish the probate court as a separate court and to give exclusive original jurisdiction in probate matters to the trial court, as is here advocated. For this reason, alternative language has been inserted in the comment, whenever necessary, to permit a separate probate court. But it is essential to the satisfactory operation of this Code that the court which has jurisdiction over probate matters be coordinate with the court of general jurisdiction, and, therefore, in a state where it is not the same court, a change in the constitution should be sought, if necessary.

COMMENTS AND APPENDICES

Much of the research incident to the preparation of this Code has been preserved in Appendix A. There it is possible to find a summary of existing statutes on important questions dealt with. For the draftsman who seeks a somewhat different solution of the problem than that adopted by the Code, the Appendix provides a method of finding related legislation.

The comments, while serving also to preserve some of the results of the research, do much more. They are a part of the report of the Committee on the Model Probate Code and suggest the rationale of important sections.

ALTERNATIVE RECOMMENDATIONS IN COMMENT

In keeping with the primary objective to make the Code a guide to draftsmen and not a uniform act, suggestions for alternative statutory provisions have been inserted in the comments to some of the sections. Sometimes this was done because of a difference of opinion on the part of the members of the drafting committee. Sometimes it was due to a feeling that, although one solution of a given problem was ordinarily to be preferred, another solution was not seriously objectionable and might, under some circumstances, be actually more desirable.

GENERAL PLAN OF THE CODE

In some probate codes an attempt is made to consolidate to a very considerable extent provisions for the administration of decedents' estates, testamentary trusts and estates under guardianship. Thus, provisions for bonds, letters, accounting and discharge may be found in a division of the code providing for fiduciaries in general. See, for example, Mich. Probate Code, c. 4, Mich. Stat. Ann. (1943) §§ 27.3178(251) to 27.3178(307). That plan has not been followed herein. In selecting language which applies to all types of fiduciaries, much may be lost in the way of precision and detail. It seems better to state the provisions for decedents' estates first, following those by a separate part on guardianship in which analogous provisions in the part on decedents' estates are incorporated by reference so far as possible. See introductory comment to Part IV. Part I and the first two divisions of Part V of the Code have general application to decedents' estates, guardianships and testamentary trusts. Indeed, Part I, being concerned largely with general provisions, comprehends any proceeding within the probate jurisdiction. Part V on "Ancillary Administration" is simply an incorporation of three acts prepared, or under consideration, by the Confer-

ence of Commissioners on Uniform State Laws. Part II, on "Intestate Succession and Wills" is largely concerned with those two branches of substantive law. Part III is mainly procedural and covers the subject of "Administration of Decedents' Estates." Part IV is devoted to the subject of "Guardianship."

IMPORTANT FEATURES OF THE CODE

It is believed that a Code which merely presents a well drawn formulation of ideas commonly found in existing probate legislation would be worth promulgating. But this Code does something more. While it is a careful codification of the American system of probate law, it seeks to improve that law at certain points.

Probate Judge to Be Same as or Coordinate with Trial Judge

First, it provides a court organization coordinate with, and a part of, the trial court of general jurisdiction. See § 6. In the early history of our probate law following the model of the English ecclesiastical courts which had probate jurisdiction, our probate courts were commonly regarded as inferior tribunals. But as their jurisdiction was gradually extended, the tendency has been to give them a status more nearly like that of the trial court of general jurisdiction. Indeed, in some states this trial court is the tribunal which sits in probate matters. It is believed that such a type of judicial organization is desirable. There is no more reason for separate probate courts in most localities than there is for separate criminal courts. But, far more important than the matter of separation of function, is the proposition that the judge in probate matters should be as well qualified and should receive as large a salary as the trial judge. This Code is so drawn that it can be enacted whether a separate probate court is

desired or whether the judge of the trial court of general jurisdiction is given jurisdiction over probate matters.

General Administration May Be Initiated Without Notice

A second important feature of this Code is that it permits probate and the appointment of an executor or a general administrator without requiring prior notice to interested persons. See § 68. This accords with the English practice of probate in common form, and also with the practice in a considerable number of states. On the other hand, in another large group of states, neither an executor nor a general administrator can be appointed without reasonable notice to interested persons. The difference between these two procedures is not as great as might at first be supposed. Under this Code, if no notice is given prior to the appointment of the personal representative, notice must be given as soon as the appointment is made, and interested persons then have an opportunity to have all matters reheard which were passed upon prior to the notice. In states where notice is required prior to the appointment of an executor or a general administrator, statutes permit the appointment of a special administrator without notice. The advantage of the appointment of an executor or general administrator without notice is that some one may take charge of the estate and preserve it as soon as the decedent dies. There is no delay for the giving of notice, nor is there the additional expense of a special administratorship. However, under this Code a court or an interested person may always require notice; or a court could adopt a rule requiring notice in all cases. Notice is required, however, in the case of guardianship estates.

Court to Have Jurisdiction Over Land

Although the English ecclesiastical courts, which to some extent provided the model for our probate system, had no

jurisdiction over land, the modern tendency is to give the probate court more and more control over the lands of the decedent. Indeed, there is no good reason why probate jurisdiction should not extend just as fully to a decedent's lands as to his personalty. This Code so provides. See §§ 6, 84, 124, 152, 183. While the personal representative does not take title to the lands of the decedent nor to his personalty, he is entitled to possession of both unless the court otherwise orders in a particular case.

Only One Contest Permitted

One of the objections to existing probate procedure which this Code seeks to obviate is the wide latitude given to will contests. If the probate of the will is upon notice to interested persons there is no reason why more than one trial and one appeal of the issue of will or no will should be permitted. Yet in some states a trial de novo of the issue is permitted in the trial court of general jurisdiction as a matter of course after the issue has already been determined in the probate court. In this Code, with one exception, it is provided that, if the will is admitted to probate on notice to interested persons, no further trial of the issue is permitted. See § 73. An interested heir must take a true appeal to an appellate court. The one exception is as follows: if the basis of contest is another will, then a contest is permitted on that ground at any time before final distribution of the estate is ordered. See § 73.

Notice to Creditors Combined with Original Notice

In this Code the published notice to creditors and the notice of the appointment of the personal representative are combined; or, if notice by publication is given prior to the hearing for the appointment of a personal representative, then the notice to creditors is combined with that notice. See §§ 69,

70. In small estates the cost of publication of notices is an important item, and these provisions are designed to reduce that expense. In addition, there is a saving of time.

Time Schedule to Insure Speedy Administration

Throughout this Code time provisions have been fixed with a view to securing as speedy an administration as is consistent with justice to all interested persons. A time schedule summarizing these periods of time appears as Appendix B. Any legislative determination of periods of time is necessarily somewhat arbitrary and legislative bodies may sometimes find it advisable to modify the periods to suit their own particular problems. However, it must be noted that, in the time periods for various procedures, one period can be modified only in relation to other time periods. Thus, ordinarily the surviving spouse should not be compelled to elect until the time for the filing of creditors' claims has expired. Hence, if modification is to be made in any procedural provisions as to time, the time schedule in Appendix B should first be consulted.

Decree of Distribution Significant in Determining Title

In this Code the decree of distribution and not the order admitting the will to probate is the significant decree in determining the title to the real and personal property of the decedent. See § 183(d). Every effort has been made to render the decree of distribution conclusive in determining who are the successors in interest of the decedent. Much uncertainty and consequent litigation will thereby be avoided.

Reduction in Number of Appeals

One of the evils of existing probate procedure is that, since nearly every probate court order is appealable, a whole series of appeals to the higher court is possible with consequent delays

and expense. To reduce this evil, provision has been made in this Code permitting the appellate court to review prior orders in the administration of decedents' estates as well as the particular order from which the appeal is taken. See § 20. It is expected that with such legislation in force, litigants will not usually appeal from anything but the final order of distribution, the order admitting the will to probate, or the order appointing the personal representative.

Dispensing with Administration

This Code presents several provisions to take care of cases where it might be desirable to dispense with administration in whole or in part. See §§ 86 to 92, 235 and 237. While it is believed that there are definite limits beyond which provisions dispensing with administration should not go, within those limits it is important to avoid the expense and delay of administration by appropriate legislation.

OMITTED MATTERS

Something should be said with respect to subjects which are excluded from this Code. Some of these, as will be hereinafter indicated, are excluded because such provisions are inherently undesirable. Others are excluded merely because it was impracticable or unnecessary to include them. This may be because they are axioms of the common law, assumed but not stated, because they impinge on other fields of law or because, though recognized by the common law, they cannot satisfactorily be expressed in statutory form. Indeed, no code, however complete, could be expected to codify all the law of decedents' estates and of guardianship. So much of the business of the probate court is administrative that the judge must often make a new rule for the actual situation when it arises. However, in so doing, he is aided by that great

body of judicial opinion which may well be described as the American common law of probate and administration and on which this Code is built.

While statutes are found in a number of states providing for public administrators, no such provision is included herein or is recommended. It is believed that a common result of establishing the office of public administrator is to encourage the official administration of estates solely because of the fees involved, although administration may be entirely unnecessary.

No special provisions are included herein concerning the probate of lost or destroyed wills. See, however, §§ 64(a) and 65(e) of the Code. Where such statutes have been enacted it is believed that their operation has not been entirely satisfactory. Formal restrictions on the probate of such wills have often been found to be too rigid; and it seems impossible to lay down any hard and fast rules which would work justly in all cases. This matter is best developed in the case law. See, in general, Ferrier, "Statutory Restrictions on Probate of Lost Wills," 32 Cal. L. Rev. 221 (1944).

After careful consideration of the subject it was determined to exclude any legislation on ante-mortem probate. The practical advantages of such a device are not great in view of the fact that few testators would wish to encounter the publicity involved in such a proceeding.

This Code makes no attempt to deal generally with problems of ademption. It is true, much well-merited criticism has been directed toward the present state of the law. See Mechem, "Specific Legacies of Unspecified Things—Ashburner v. Macguire Reconsidered," 87 U. of Pa. L. Rev. 546 (1939); Page, "Ademption by Extinction: Its Practical Effects," (1943) Wis. L. Rev. 11; Warren, "History of Ademption," 25 Iowa L. Rev. 290 (1940). But the problems are believed to involve a subject matter which can better be

handled by unwritten law than by statutes. If the courts would adopt a less rigid definition of a specific legacy, many of the difficulties would disappear without legislation. However, in one situation, a single aspect of the subject is dealt with in connection with guardianship. See § 231.

No provisions are presented with respect to the effect of the murder of the testator or intestate by a person interested in his estate. Any adequate legislation on this subject would extend beyond the probate field and include analogous problems involved in the murder of the insured by the beneficiary of a life insurance policy, the murder of a life tenant by a remainderman, and the murder of a joint tenant or tenant by the entireties by another co-tenant. Moreover, an adequate statement of common-law doctrines covering all these situations is to be found in the American Law Institute Restatement of the Law of Restitution, §§ 187-189 (1937). If the courts adhere to this Restatement, little, if any, legislation will be needed. However, it must be conceded that, according to the law of some states, the murderer of the decedent may take as heir or devisee. See cases cited in 51 A. L. R. 1096. Where this is the case, legislation would be desirable. For helpful suggestions as to legislation on this subject, see Wade, "Acquisition of Property by Wilfully Killing Another—A Statutory Solution," 49 Harv. L. Rev. 715 (1936).

Aside from the fact that testamentary trusts are within the scope of Part I of this Code, containing general provisions, and Part V, on Ancillary Administration, no general provisions are included on this subject. - A probate code might well contain a separate part devoted solely to the subject of testamentary trusts. However, no good reason is perceived why testamentary trusts should, for most purposes, be differentiated from inter vivos trusts; and a judicial organization which gives to one set of courts exclusive jurisdiction over testamentary trusts and to another exclusive jurisdiction over inter

vivos trusts is open to criticism. If the judge having probate jurisdiction is also the judge of the trial court of general jurisdiction, then this difficulty does not arise. If, however, there is a separate probate court, with jurisdiction over testamentary trusts, then something more on this subject in a probate code may be desirable. However, a better solution of the problem, even in that situation, would be to enact a separate body of statute law entirely outside the probate code, dealing with the administration of both testamentary and inter vivos trusts.

No provisions for the administration of partnership estates when a partner dies have been included. Several states have statutes providing that unless the surviving partner files a bond with the probate court, the personal representative of the deceased partner may administer the partnership estate upon giving an additional bond. Kan. Gen. Stat. (Supp. 1943) §§ 59-1001 to 59-1005; Mo. Rev. Stat. Ann. (1942) §§ 81 to 93. In these states the administration of partnership estates upon the death of a partner is brought more or less completely under the jurisdiction of the probate court. While the provisions afford security to parties in interest, they have caused complications in the settlement of partnership estates and have produced much litigation. Woerner, *Administration* (3rd ed., 1923) §§ 128 to 130; annotation, 121 A. L. R. 860. These statutes have been held to be inconsistent with section 37 of the Uniform Partnership Act providing for winding up by the surviving partner. *Davis v. Hutchinson* (C. C. A. 9th, 1929) 36 F. (2d) 309. Hence the Model Probate Code contains no provision regarding partnership property except for inclusion in the inventory of the decedent's proportionate share of any partnership. See § 120. However, it is suggested that the Uniform Partnership Act should be included in the statutes of the states which have not already enacted it.

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UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT

UNIFORM WILLS ACT, FOREIGN PROBATED

An Act to Establish a Probate Code, Including the Law in Relation to Descent and Distribution, Wills, Administration and Guardianship

Comment. As to the constitutionality of the enactment of an entire probate code under a single title where there are constitutional provisions requiring each legislative enactment to have a single subject, see *Johnson v. Harrison*, 47 Minn. 575, 50 N.W. 923 (1891); *Evans v. Superior Court*, 215 Cal. 58, 8 P.(2d) 467 (1932); Fins, "Analysis of the Illinois Probate Code," 34 Ill. L. Rev. 405 (1939); Evans, "Comments on the Probate Code of California," 19 Cal. L. Rev. 602 (1931) (see particularly the footnote on page 602); Clark and Walrath, "Questions Arising Under the Probate Act," 8 Fla. L. J. 77 at 84 (1934).

PART I. GENERAL PROVISIONS

§ 1. Short title. This Act shall be known and may be cited as the Probate Code.

§ 2. How Code to take effect.

(a) **Effective date.** This Code shall take effect and be in force on and after January 1, 19—. The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of the act and also all further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court their application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply.

(b) **Rights not affected.** No act done in any proceeding commenced before this Code takes effect and no accrued right shall be impaired by its provisions. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provision of

any statute in force before this Code takes effect, such provision shall remain in force and be deemed a part of this Code with respect to such right.

(c) **Severability.** If any provision of this Code or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Comment. Statutes of this type are usual in codes and in acts of any considerable length. Subsection (a) is modeled after Fed. Rules Civ. Proc., Rule 86. North Dakota Compiled Laws (1913) §§ 8509 and 8510 furnished the model for subsection (b). Subsection (c) follows the form recommended by the National Conference of Commissioners on Uniform State Laws. See Handbook of the National Conference of Commissioners on Uniform State Laws (1943) p. 288.

§ 3. Definitions and use of terms. When used in this Code, unless otherwise apparent from the context:

- (a) "Child" includes an adopted child but does not include a grandchild or other more remote descendants, nor, except as provided in section 26, an illegitimate child.
- (b) "Claims" include liabilities of the decedent which survive, whether arising in contract or in tort or otherwise, funeral expenses, the expense of a tombstone, expenses of administration and all estate and inheritance taxes.
- (c) "Devise," when used as a noun, means a testamentary disposition of real or personal property or both.
- (d) "Devise," when used as a verb, means to dispose of real or personal property or both by will.
- (e) "Devisee" includes legatee.
- (f) "Distributee" denotes those persons who are entitled to the real and personal property of a decedent under his will or under the statutes of intestate succession.

- (g) "Estate" denotes the real and personal property of the decedent or ward, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions and additions thereto and substitutions therefor and diminished by any decreases and distributions therefrom.
- (h) "Exempt property" refers to that property of a decedent's estate which is described in section 43 hereof.
- (i) "Fiduciary" includes personal representative, guardian and testamentary trustee.
- (j) "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on his death intestate.
- (k) "Interested persons" means heirs, devisees, spouses, creditors or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved.
- (l) "Issue" of a person, when used to refer to persons who take by intestate succession, includes all lawful lineal descendants except those who are the lineal descendants of living lineal descendants of the intestate.
- (m) "Lease" includes an oil and gas lease or other mineral lease.
- (n) "Legacy" means a testamentary disposition of personal property.
- (o) "Legatee" means a person entitled to personal property under a will.
- (p) "Letters" includes letters testamentary, letters of administration and letters of guardianship.
- (q) "Mortgage" includes deed of trust, vendor's lien and chattel mortgage.

- (r) "Net estate" refers to the real and personal property of a decedent exclusive of homestead rights, exempt property, the family allowance and enforceable claims against the estate.
- (s) "Person" includes natural persons and corporations.
- (t) "Personal property" includes interests in goods, money, choses in action, evidences of debt and chattels real.
- (u) "Personal representative" includes executor, administrator, and special administrator.
- (v) "Property" includes both real and personal property.
- (w) "Real property" includes estates and interests in land, corporeal or incorporeal, legal or equitable, other than chattels real.
- (x) "Will" includes codicil; it also includes a testamentary instrument which merely appoints an executor and a testamentary instrument which merely revokes or revives another will.
- (y) The singular number includes the plural; the plural number includes the singular.
- (z) The masculine gender includes the feminine and neuter.

Comment. Definitional sections such as this are sometimes found in various codes. They are believed to be important aids to clearness and precision. An example of such a statute in the Florida probate Code is Fla. Stat. Ann. (1941) § 731.03. See, also, a statute of this type in Cal. Code Civ. Proc. (Deering, 1941) § 17.

For definitional sections applicable only to particular parts of this Code, see §§ 196, 238 and 256.

§ 4. Qualifications of judge. No person shall be eligible to the office of [judge] unless he shall have been admitted to practice in this state for a period of at least [five] years immediately before assuming his office and shall have practiced law or held judicial office in this state for [five] years.

Comment. As is indicated in the introduction to this Code, the most desirable form of judicial organization is one in which the judge

of the trial court of general jurisdiction is also a judge in probate matters. If such a form of organization is provided, this and the next succeeding section would normally be found in the general provisions on judicial organization. But whether there is a separate court for probate matters or not, high standards for the office of judge are indispensable to the successful operation of this Code; and it is contemplated that the requirements for judges be substantially the same as those for judges in the trial court of general jurisdiction.

In any jurisdiction where probate judges have not, in the past, been required to be members of the bar, it may be desirable to insert in this section a further provision to the effect that all persons otherwise qualified to hold the office of probate judge, who have held that office immediately prior to the date when this Code becomes operative, shall be qualified to hold the office of judge in probate matters. Examples of provisions of this kind may be found in existing legislation. Thus, Ohio Gen. Code (Page, 1937) §10501-1 is as follows: "Quadrennially, in each county having a separate probate court, one probate judge shall be elected who shall have been admitted to practice as attorney and counselor at law in this state, or who shall have previously served as probate judge immediately prior to his election." Wis. Stat. (1943) §253.02, in stating the qualifications for county judge in counties of over 14,000 population, adds "Such provision shall not disqualify any person who held such office in this state on or before the first day of July, 1933." The Missouri Constitution, just adopted, provides (Art. V, §25) ". . . every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed."

§ 5. Salaries of judges. The salaries of [] judges] shall be \$[] per annum, which shall not be decreased during their respective terms of office.

§ 6. Jurisdiction. The [] court shall have plenary jurisdiction of the administration, settlement and distribution of estates of decedents, whether consisting of real or personal property or both, the probate of wills, the granting of letters testamentary, of administration and of guardianship, the construction of wills, whether incident to the administration of an estate or as a separate proceeding, the determination of heirship, the administration of testamentary trusts, and the

administration of guardianships of minors and other incompetents. It shall have the same legal and equitable powers to effectuate its jurisdiction and to carry out its orders, judgments and decrees, and the same presumptions shall exist as to the validity of such orders, judgments and decrees in probate as in other matters.

Comment. It is assumed that the jurisdiction to probate and to administer estates is exclusive except to the extent that legislation otherwise provides. Administration of decedents' estates in chancery as recognized in English law would not be permissible under this Code. If the former practice of a jurisdiction is such that the opposite conclusion might be reached by a court, it would be desirable to insert at the end of the first paragraph of this section a statement to the effect that administration of decedents' estates in Chancery is hereby abolished. As to the jurisdiction to administer estates under guardianship, see § 199 and Introductory Comment to Part IV.

The chief reason for giving a probate court jurisdiction over testamentary trusts is that the judge's familiarity with the decedent's estate from which the trust is set up enables him to decide questions about the trust with a fuller appreciation of the factual problems involved than would another judge. Sometimes, however, an inter vivos trust has been set up by a testator prior to his death which has a very close relation to a trust set up by his will. Indeed, the provisions in the will may be such that it is difficult to determine whether there is a separate testamentary trust or whether the testator has merely increased the corpus of the inter vivos trust. To take care of these and similar situations, it would be desirable to have a statute in the general procedural or court organization sections of the statutes of a state which would permit the transfer of a testamentary trust to a judge or court handling a related inter vivos trust or vice versa. No such provision is included in this Code because its scope would be somewhat broader than probate matters.

If there is a separate probate court, there should be substituted for the phrase "in probate as in other matters" the following: "as in the trial court of general jurisdiction." The sentence of which this phrase is a part is designed to eliminate any trace of the notion that the court of general jurisdiction sitting as a probate court, or that the probate court, is a court of inferior jurisdiction. Since this idea was once very widespread, it is important to negative it expressly. For an excellent statute which accomplishes this purpose, see Mass. Ann. Laws (1932) c. 215, § 2.

It should be observed that, if the Uniform Declaratory Judgments Act is in force, it would apply to the jurisdiction of the court to make declaratory judgments in probate matters. Compare also § 60 of this Code which specifically provides for declaratory judgments in the construction of a will.

§ 7. Distribution of business. In all counties in which the court is composed of two or more judges, such court shall provide by local rule for the distribution of the business of the court between the judges and also for the order of business.

Comment. If probate matters are handled by the trial court of general jurisdiction, the business would normally be distributed so that one or more of the judges handles probate matters exclusively. In California, where probate matters are handled by the Superior Court, such a provision is employed to accomplish this result in the larger counties of that state. See Rules 21-24 inclusive of the Rules of Superior Courts, in Larmac, Index to California Laws (1943) pp. 1786-1790.

If a separate probate court is provided for and there are two or more probate judges, this section can still be used to bring about some distribution of business on the basis of its character. Thus, one judge may handle exclusively matters of decedents' estates, while to another may be assigned matters of guardianship and related matters.

In general, as to the subject matter of this section, see Pound, Organization of Courts (1940); Arnold, What Is My Jurisdiction?—A Treatise on the Constitutional Jurisdiction of Probate Courts in Missouri (1944).

§ 8. Court open at reasonable hours. The court shall be open for the transaction of probate business at all reasonable hours.

Comment. Due to the nature of its business, the court should not be subject to the strictures of terms of court, but should be open at all reasonable hours for the conduct of probate business. Fiduciaries must be appointed promptly in order to preserve the estates; and emergencies in administration may arise at any time which require a prompt decision. Statutes such as this section are not uncommon. See, for example, Kan. Gen. Stat. (Supp. 1943) § 59-211; Mich. Stat. Ann. (1943) § 27.3178(30); Minn. Stat. (1941) § 525.01. Indeed, some legislation provides that the probate court shall be open at all

times. See Fla. Stat. Ann. (1941) § 732.02; N. Y. Surr. Ct. Act, § 34.

§ 9. Disqualification of judge.

(a) **When and how judge disqualified.** When any judge or his spouse shall be related within the third degree of consanguinity according to the civil law to any of the parties or their attorneys, shall have drawn the will of the decedent, or shall be interested or have been counsel in any probate proceeding or any matter therein, the same shall be grounds for disqualifying such judge from acting in such proceeding or the particular matter with respect to which his disqualification exists. When grounds for disqualification exist, the judge may refuse to act as judge therein; or, upon the filing of a petition to disqualify such judge, stating the grounds therefor, by any person interested in the estate or the particular matter with respect to which his disqualification exists, the judge must not act therein.

(b) **How another judge obtained; validity of his acts.** When any judge shall be disqualified, or unable to act as judge due to illness or absence from the county, or when in his opinion the interest of the public or of any person interested in any matter requires that another judge act in his stead, such judge or the presiding judge, if any, may request another judge of a court of record of the same or another district to act in his place; but in either case, if all persons or their attorneys interested in the proceeding or matter shall agree by written stipulation, a member of the bar having the same qualifications as are required for judge may be requested and appointed to act as judge therein. All orders, judgments and decrees made by such acting judge shall have the same force and effect as if made by the regular judge.

Comment. The provisions of this section were suggested by Minn. Stat. (1941) §§ 525.05, 525.051, 525.052. Compare Kan. Gen. Stat. (Supp. 1943) § 59-203. The only disqualifications considered here are those in connection with probate proceedings. If a judge is

prejudiced against any party in a particular matter, or is temporarily or permanently disabled from performing his duties, other provisions may be necessary, but will ordinarily be contained in other statutes on judicial organization.

§ 10. Power of courts to make rules. The [supreme court] may, on the recommendation of the majority of the [judges], or on its own motion, promulgate rules and forms of procedure for probate proceedings, not inconsistent with the provisions of this Code. Each [] court may promulgate rules and forms of procedure for probate proceedings, not inconsistent with the provisions of this Code nor with such rules and forms as are promulgated by the [supreme court]. If in any probate proceeding a situation arises which is not provided for by any statute or rule of procedure, the court may formulate and declare a rule of procedure for that particular case.

Comment. Provisions regarding the making of court rules show some variation from state to state. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 154, is similar in substance to the Model Probate Code. Kan. Gen. Stat. (Supp. 1943) § 59-2501 provides simply for the making of rules by the supreme court, without any such power in the probate judges. Under the provisions of Minn. Stat. (1941) § 525.06, the probate judges themselves make rules at an annual assembly. Mich. Stat. Ann. (1943) § 27.3178(53) and Ohio Gen. Code (Page, 1937) § 10501-13 are similar to the Minnesota statute except that the rules must be submitted to and adopted by the supreme court.

In some states it is provided by statute that where there is no other applicable statute or rule, the rules of civil procedure may be applied. See Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 155, and Ohio Gen. Code (Page, Supp. 1944) § 10501-22. Such legislation is not recommended. Much of the proceedings in matters of probate is administrative in character and not adversary. It is believed, therefore, that rules of civil procedure designed primarily for adversary proceedings should not be applied.

The term "supreme court" as used in this section refers to the highest appellate court of the state to which appeals are taken. If that court is referred to by some other designation in a given state, that designation should be substituted in this section. The blanks preceding

the word "judges" and the word "court" in this section are to be filled by the name of the court of original jurisdiction in probate matters.

§ 11. Powers of clerk.

(a) **Ministerial matters.** The clerk shall have power to take acknowledgments, administer oaths, and to certify and authenticate copies of instruments, documents and records of the court, and to perform the usual functions of his office.

(b) **Notices of hearing.** Subject to control of the judge, the clerk shall have power to issue notices and to make all necessary orders for the hearing of any petition or other matter to be heard in the court.

(c) **Judicial powers.** If a matter is not contested, the clerk may hear and determine it and make all orders, judgments and decrees in connection therewith which the judge could make, subject to be set aside or modified by the judge at any time within thirty days thereafter; but if not so set aside or modified such orders, judgments and decrees shall have the same effect as if made by the court or judge.

Comment. In most states clerks of probate courts have been given some judicial powers, or are authorized to exercise judicial powers under special circumstances, as in the absence of the judge, or in non-contentious matters. This is believed justified in the interests of the efficient conduct of the business of the court, provided that general supervision or revision of the acts of the clerk is adequately provided for. See Simes and Basye, "Organization of the Probate Court in America," 42 Mich. L. Rev. 965 (1944) and 43 Mich. L. Rev. 113 at 145-150 (1944). For a provision in the Federal Rules of Civil Procedure giving certain judicial powers to the clerk, see Fed. Rules Civ. Proc., Rule 77(c).

Due to the nature of probate business, the court should be easily accessible to all persons. Hence, it is almost the universal practice, where there are separate courts of probate, to have at least one in each county. Upon the adoption of the recommendations made herein to the effect that probate matters be handled by the trial court of general jurisdiction, that court may be organized to serve a larger district than a county as a circuit or district court. Nevertheless, it is desirable that such a court sit in each county, and that a clerk and probate records be found in each county. This is the practice in some states where such

a judicial organization is now in force, and it is assumed that such practice would be followed where this Code is adopted.

§ 12. Application to court by verified petition. Every application to the court, unless otherwise provided, shall be by petition signed and verified by or on behalf of the petitioner. No defect of form or substance in any petition, nor the absence of a petition, shall invalidate any proceedings.

Comment. In civil procedural rules there has been a modern tendency to do away with a requirement of verification of pleadings. See, for example, Fed. Rules Civ. Proc., Rule 11. However, in probate matters the situation is believed to call for verification. Often the proceeding is ex parte or is not contested and little or no evidence is introduced other than the verified petition. Moreover, in such a case, if the petitioner is present in court, the verified petition not only may be accepted in lieu of his testimony, but may be substituted for a written record of such testimony.

The last line of this section is similar to Kan. Gen. Stat. (Supp. 1943) § 59-2201 and Minn. Stat. (1941) § 525.81. It should be noted that it merely states that such a defective petition or the absence of a petition does not make the proceeding void. It does not prevent an opposing litigant from insisting upon the filing of an amended petition, nor does it dispense with proof of the necessary facts.

§ 13. Filing objections to petition. Any interested person, on or before the day set for hearing, may file written objections to a petition previously filed, and, upon special order or general rule of the court, objections to such petition must be filed in writing as a prerequisite of being heard by the court.

§ 14. Notice.

(a) **When notice to be given.** No notice to interested persons need be given except as specifically provided for in this Code or as ordered by the court. When no notice is required by this Code, the court may require such notice as it deems desirable by a general rule or by an order in a particular case.

(b) **Kinds of notice required.** Unless waived and except as otherwise provided by law, all notices required by this

Code to be served upon any person shall be served as the court shall direct, by rule or in a particular case, either

- (1) By delivering a copy of the same at least seven days before the hearing to such person personally; or
- (2) By publishing once in each week for three weeks consecutively in some newspaper printed and circulating in the county where said court is held, the first day of publication to be at least thirty days prior to the date set for hearing; or in case there be no newspaper printed in said county, then in some newspaper published in this state and designated by the judge or clerk, circulating in the county where the proceeding is pending; or
- (3) By registered mail, requesting a return receipt signed by addressee only, addressed to such person located in the United States at his address stated in the petition for the hearing, to be posted by depositing in any United States post office in this state at least fourteen days prior to the date set for hearing in said notice; or
- (4) By any combination of two or more of the above.

In all cases where service by publication is ordered, but personal service or service by registered mail is not ordered, all persons whose names and addresses are given in the petition shall be served by ordinary mail in the same manner and with the same requirements as provided herein for service by registered mail except that no registration shall be required.

(c) By whom service made. Service by publication and by registered and ordinary mail shall be made by the clerk at the instance of the party who requires such service to be made. Personal service may be made in any part of this state by any competent person.

(d) **Service on attorney.** If an attorney shall have entered his appearance in writing for any party in any probate proceeding or matter pending in the court, all notices required to be served on the party in such proceeding or matter shall be served on the attorney and such service shall be in lieu of service upon the party for whom the attorney appears.

Comment. In some instances the Code requires a particular kind of notice to be given. See, for example, §§ 69 and 70 requiring notice by publication and by registered mail either prior to the hearing on the petition for probate or administration or on the appointment of the personal representative. In other instances the Code merely states that notice must be given. In such case this section provides the different kinds of notices from which the court makes a selection. This selection may be made in each particular case or by a rule of court. Moreover, in any case where the Code requires no notice, the court may in its discretion order notice or may make a general rule as to notice in any class of cases. The kind of notice so ordered is to be determined by the court. For example, a court order could make express provision for service by ordinary mail, or for service in any other reasonable manner whether expressly provided for in subsection (b) hereof or not. Under § 11(b) the clerk may, subject to the control of the court and any standing rules of court, direct the manner of service.

§ 15. Proof of service. Proof of service in all cases requiring notice, whether by publication, mailing or otherwise, shall be filed before the hearing. Service made by a private person shall be proved by the affidavit of the person; service made by the clerk or other official shall be proved by certificate or return of service. In the case of service by registered mail, the return receipt shall be attached to the proof of service if a receipt has been received; if no receipt has been received the court may, in its discretion, order further service on the party.

§ 16. Waiver of notice. Any person legally competent who is interested in any hearing in a probate proceeding may in person or by attorney waive in writing notice of such hearing. A guardian of the estate or a guardian ad litem may make such a waiver on behalf of his ward, and a trustee may make

such a waiver on behalf of the beneficiary of his trust. A consul or other representative of a foreign government, whose appearance has been entered as provided by law on behalf of any person residing in a foreign country, may make such waiver of notice on behalf of such person. Any person who submits to the jurisdiction of the court in any hearing shall be deemed to have waived notice thereof.

§ 17. Stenographic record. The judge may of his own motion, or on the request of an interested person, direct the stenographer of his court to attend any hearing in a probate proceeding and make a stenographic record of the same.

Comment. In metropolitan areas it might be desirable to provide for a court stenographer who would make a stenographic record of all hearings. This can easily be accomplished under the Code by a rule of court to that effect. However, in less populous areas the rule laid down in this section would appear to be sufficient.

§ 18. Jury trial.

(a) **Right to jury trial; waiver.** Whenever the right to trial by jury is guaranteed by the constitution of this state, any person entitled thereto may file a written demand for trial by jury prior to the hearing of the issues of fact. The right to trial by jury is waived if a demand is not so filed, or if the person claiming the right fails to appear at the hearing or fails to object to trial by the court before evidence is commenced.

(b) **When not of right.** When, under subsection (a) hereof, there is no right to trial by jury or if the right is waived, the court in its discretion may call a jury to decide any issues of fact, but the verdict in such case shall be advisory only.

Comment. Most of the questions of fact likely to arise in connection with probate matters can be decided more satisfactorily by the judge than by the jury and at less expense. Therefore, if it were not for the possibility of violating constitutional provisions which preserve the right to jury trial, it would be desirable to provide that there shall be no trial by jury except under the circumstances stated in subsection (b) hereof. It is clear that there was no right of trial by jury in

England in chancery or in the ecclesiastical courts, which were the predecessors of probate courts. But certain steps in a modern proceeding for the administration of the estate of a decedent may be regarded as merely proceedings at law which, for convenience, have been transferred to the court having jurisdiction of probate matters. Most important among these are the adjudication of creditors' claims and the determination of title in disclosure proceedings. This section seeks to insure that the constitutional right to trial by jury is not violated and at the same time to minimize as far as possible the use of the jury. Similar provisions are found in Fed. Rules Civ. Proc., Rules 38 and 39, and N. Y. Surr. Ct. Act, §§ 67 and 68.

It should be noted that, if the constitution of a state does not guarantee a right to trial by jury in probate matters, then a statute which denies such a jury trial would not violate any provision of the Federal constitution, either as to jury trial or as to due process of law. Hence, if it is clear that a state constitution does not guarantee a right to trial by jury in probate matters, it would be desirable, instead of the form of § 18 here proposed, to substitute a provision to the effect that there should be no right to a jury trial but that the court might, in its discretion, order a trial of issues of fact by a jury, the verdict of which would be purely advisory.

By the great weight of authority there is no constitutional right to jury trial of a will contest. Annotation, 62 A.L.R. 82; but see *Corley v. McElmeel*, 149 N. Y. 228, 43 N. E. 628 (1896). Many jurisdictions, however, grant jury trial of right by statute. See annotation, 62 A.L.R. 82, 85. This is not recommended; but if it were thought to be desirable, a subsection to this effect could be added to § 18, and appropriate changes made in subsections (a) and (b). In Massachusetts and New York a jury issue in a probate proceeding may be transferred for trial to the ordinary trial court of general jurisdiction. Mass. Ann. Laws (1932) c. 215, § 16; N. Y. Surr. Ct. Act, § 68.

§ 19. Vacation and modification of judgments. For good cause, at any time within the period allowed for appeal after the final termination of the administration of the estate of a decedent or ward, the court may vacate or modify its orders, judgments and decrees, or grant a rehearing therein, except that no such power shall exist as to any orders, judgments or decrees from which an appeal has been taken, prior to a final disposition thereof on such appeal, or to set aside the

probate of a will after the time allowed for contest thereof. No vacation or modification under this section shall affect any act done or any right acquired in reliance on any such order, judgment or decree.

Comment. One of the reasons for the inferior position of probate courts in our system of judicial organization has been their lack of power over their own orders and judgments such as exists in courts of general jurisdiction. It is true that over a long period of years some small amount of control has been granted with respect to particular orders and usually for short periods of time; but it has been wholly inadequate for the needs. Obviously some effective control is necessary in the interests of efficient administration. The very fact of the ex parte nature of much of probate procedure makes this highly desirable.

If the need for such control is granted, the time element is also important. A few statutes have restricted this control to a time corresponding to the period allowed for filing a motion for a new trial; others to a period corresponding to the time for taking an appeal. In view of the fact that an administration proceeding is one proceeding consisting of many steps or stages which are inextricably connected and related, it seems advisable to extend this control throughout the entire proceeding and also for a time thereafter corresponding to the time for taking an appeal.

It is not intended that this power be arbitrary, but must depend for its exercise upon the existence of facts constituting "good cause." Furthermore, the exercise of such power may not affect acts done or rights acquired in reliance on any order, judgment or decree prior to its vacation or modification.

In addition to statutory provisions such as this for relief against a judgment or decree, there are rules of equity giving relief from the judgment of a court of general jurisdiction in certain cases of fraud, duress and error. See Restatement, Judgments (1942) §§ 118-126. As will be seen from § 6 of this Code, the court having jurisdiction in probate matters is a court of general jurisdiction. Hence, the relief provided for in § 19 hereof is supplementary to the relief given in equity against judgments in the absence of statute.

§ 20. Appeals.

(a) **Appeal to [supreme court] permitted.** Except as provided in subsection (b) hereof, a person aggrieved by an order, judgment or decree of the [] court, in pro-

ceedings under the provisions of this Code, may obtain a review of the same by the [supreme court].

(b) Orders which are not appealable. There shall be no appeal from any order removing any fiduciary for failure to give a new bond or to render an account as required by the court, nor from an order appointing a special administrator, nor from an order granting a rehearing, nor, by any person except the widow or children affected thereby, from an order granting an allowance to the widow or children of a decedent pending settlement of the estate or setting apart exempt personal property to them.

(c) When appeal heard with appeal from decree of final distribution. When an appeal is taken with respect to any appealable order, judgment or decree in the administration of a decedent's estate, made prior to the decree of final distribution, other than an order admitting or denying the probate of a will or appointing or refusing to appoint a personal representative, the [] court may, in its discretion, order that the appeal be stayed until the decree of final distribution is made and that the appeal be heard only as a part of any appeal which may be taken from the decree of final distribution. This subsection shall not apply to guardianships and testamentary trusts.

(d) When appeal from decree of final distribution includes appeal from prior orders. When an appeal is taken from the decree of final distribution in the administration of a decedent's estate, all prior appealable orders, judgments and decrees to which the appellant has filed objections in writing within five days after the order, judgment or decree was rendered and from which an appeal has not theretofore been taken, except orders admitting or denying the probate of a will or appointing a personal representative shall, at the election of the appellant, be reviewed. The appellant shall indicate such election by clearly stating in the appeal the orders, judgments and decrees which he desires to have reviewed.

(e) **Stay.** An appeal shall stay other proceedings in the court from which the appeal is taken unless, or to the extent that, such court finds that neither the interested persons nor the court will be prejudiced and by order permits other proceedings to be had.

(f) **When fiduciary not required to give appeal bond.** No appeal bond shall be required of a fiduciary when he appeals on behalf of the estate.

(g) **Applicability of general appellate rules.** Except as provided in this section, the provisions as to time, manner, notice, appeal bonds, stays, scope of review and all other matters relating to appellate review shall be determined by the rules applicable to appeals to the [supreme court] in equity cases except that in cases where jury trial has been had of right, the rules applicable to the scope of review in jury cases shall apply.

Comment. This section follows the lead of several states in discarding the notion of an appeal from the probate court as a trial de novo in the trial court of general jurisdiction. For the reasons in favor of the position taken herein, see Simes and Basye, "The Organization of the Probate Court in America," 42 Mich. L. Rev. 965 (1944), and 43 Mich. L. Rev. 113 (1944).

The general plan of making all orders appealable except such as are expressly excluded follows the Michigan statute. See Mich. Stat. Ann. (1943) § 27.3178(37). It is believed that this form is much less cumbersome than that of the Kansas statute which purports to list practically all appealable orders. See Kan. Gen. Stat. (Supp. 1943) § 59-2401.

In subsections (a) and (c), the name of the trial court or the probate court, as the case may be, should be supplied in the bracketed blank preceding the word "court."

The provisions of subsections (c) and (d) for postponing appeals as to particular orders are designed to mitigate the evils involved in permitting numerous appeals to the supreme court in the same probate proceeding. As to the applicability of subsections (b), (c) and (d) to guardianship, see comment to § 215.

The appeal follows the procedure of an appeal in equity in most cases. The provision to that effect was suggested by Mass. Ann. Laws (1932) c. 215, § 9. If, in a given state, equity and law appeals are the same, then subsection (g) should be modified. Of course, if the supreme

court is not the tribunal to which cases are appealed from the trial court of general jurisdiction, then the name of the proper appellate tribunal should be substituted.

§ 21. Records. The court shall keep the following records:

- (a) An index in which files pertaining to estates of deceased persons shall be indexed under the name of the decedent, and those pertaining to guardianships under the name of the ward; after the name of each file shall be shown the file number and the book and page of the register.
- (b) A register, in which shall be listed in chronological order under the name of the decedent or ward, all documents filed or issued and all orders, judgments and decrees made pertaining to the estate, the date thereof, and a reference to the volume and page of any other book in which any record shall have been made of such document.
- (c) A record of wills, properly indexed, in which shall be recorded all wills admitted to probate with the certificate of probate thereof;
- (d) A record of bonds, properly indexed, in which shall be recorded all bonds filed;
- (e) A record of letters, properly indexed, in which shall be entered all letters issued;
- (f) A record of probate proceedings, which shall contain the minutes of the proceedings, and all orders, judgments and decrees of the court.

PART II. INTESTATE SUCCESSION AND WILLS

INTESTATE SUCCESSION

§ 22. General rules of descent. The net estate of a person dying intestate shall descend and be distributed as follows:

- (a) **Share of surviving spouse.** The surviving spouse shall receive the following share:
- (1) One-half of the net estate if the intestate is survived by issue; or
 - (2) The first five thousand dollars and one-half of the remainder of the net estate, if there is no surviving issue, but the intestate is survived by one or more of his parents, or of his brothers, sisters or their issue; or
 - (3) All of the net estate, if there is no surviving issue nor parent nor issue of a parent.
- (b) **Shares of others than surviving spouse.** The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, shall descend and be distributed as follows:
- (1) To the issue of the intestate; if they are all in the same degree of kinship to the intestate they shall take equally, or if of unequal degree, then those of more remote degrees shall take by representation.
 - (2) If there is no surviving issue of the intestate, then to the surviving parents, brothers and sisters and the issue of deceased brothers and sisters of the intestate. Each living parent of the intestate shall be treated as of the same degree as a brother or sister, and shall be entitled to the same share as a brother or sister. Issue of deceased brothers and sisters shall take by representation.
 - (3) If there is no surviving parent or brother or sister of the intestate, then to the issue of brothers and sisters. If such distributees are all in the same degree of kinship to the intestate they shall take equally, or if of unequal degree,

then those of more remote degrees shall take by representation.

- (4) If there is no surviving issue, or parent of the intestate, or issue of a parent, then to the surviving grandparents of the intestate equally.
- (5) If there is no surviving issue, or parent, or issue of a parent, or grandparent of the intestate, then to the issue of deceased grandparents in the nearest degree of kinship to the intestate per capita without representation. The degree of kinship shall be computed according to the rules of the civil law; that is, by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of these two counts.
- (6) If there is no person mentioned in the preceding five parts of this subsection, then to the State of [].

- (c) **Meaning of representation.** "Representation" refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: after first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate, but who left issue surviving; each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate; this

division shall continue until each portion falls to a living person. All distributees except those in the nearest degree are said to take by representation.

Comment. This section is in accord with certain modern trends. First, real and personal property are distributed in exactly the same way. While in feudal England a person might well desire one person to inherit his real estate on his death intestate and another to be the distributee of his personalty, there is no reason why such a differentiation should be made today. Examples of statutes of descent and distribution in which real and personal estate pass in exactly the same way are: Fla. Stat. Ann. (1941) § 731.23; Ohio Gen. Code (Page, 1937) § 10503-1.

Second, no distinction is made between ancestral and non-ancestral real estate. Under English rules it was once the law that the heir must trace descent from the person last seized. This doctrine was adapted to American statutes of descent and distribution in a number of states by provisions for a different line of descent when real property came to the intestate by "descent, devise or deed of gift" from some one of his ancestors. Gradually such provisions have been repealed, although some of them remain on the statute books. See Pa. Stat. Ann. (Purdon, 1930) t. 20, § 75, and Ohio Gen. Code (Page, 1937) § 10503-1 for statutes which eliminate any distinction as to ancestral land. It is believed that such a distinction only complicates land titles and does not serve to carry out any wish of the intestate.

Third, this section, unlike many American statutes, does not permit all persons of the blood of the intestate, however remote, to take as heirs. This is believed to accord with the wishes of the average person who dies intestate. Relatives may be so distant that the decedent might well prefer that his property go to the state rather than to such relatives. The present English statute of descent and distribution recognizes this principle. See Administration of Estates Act, 15 Geo. V, c. 23, § 46 (1925). Some American states also cut off the line of inheritance short of the most remote relative of the blood of the intestate. See D. C. Code (1940) § 18-717 (as to personalty only); Kan. Gen. Stat. (Supp. 1943) § 59-509; Md. Code (1939) art. 93, § 143.

The general scheme of this Code is first to give a very substantial share to the surviving spouse. Then, lineal heirs take to the most remote degree, which is in accordance with the statutes in all states.

According to the English rule, lineal descendants take per stirpes, the children being the stirpes even though all children are dead. Such is the rule in some states. However, in a larger number of states the

rule here announced is followed, namely, that distribution is per stirpes only if the claimants are in unequal degrees, and in that case the stirpes are those represented by the claimants in the nearest degree to the intestate. See, for example, Mich. Stat. Ann. (1943) § 27-3178(150) subd. 2; Wis. Stat. (1943) § 237.01, subd. 1. But compare the interpretation of Cal. Prob. Code Ann. (Deering, 1944) §§ 222 and 250 in *Maud v. Catherwood* (Cal. App. 1945), 155 P. (2d) 111.

In general, Anglo-American statutes dealing with inheritance by collateral heirs are based on two systems, the parentelic system and the civil law system, although most of them represent a combination of these two. Under the parentelic system, if there are no lineal descendants, the nearest ascendants, namely, the parents, take, and then their issue to the remotest degree take by representation. In the absence of parents and their issue, then grandparents take, and if there are none, then the issue of grandparents in like manner as the issue of parents. This process may be continued indefinitely as more and more remote ascendants and their issue are permitted to take.

In accordance with the civil law system, the heirs are those who are nearest in degree to the intestate. Degrees are determined by counting from the decedent up to the common ancestor and then down to the claimant. The total is the degree of relationship of the claimant to the testator. As between two claimants, the one who is removed from the intestate by the smaller number of degrees is the distributee.

With some modifications, the parentelic scheme is followed in this statute up to a certain point. As is commonly provided in statutes, however, parents take equally with, and not in preference to, brothers and sisters. See, for example, Ga. Code Ann. (1936) § 113-903, subd. 6; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 162; Miss. Code (1942) § 468; Mo. Rev. Stat. Ann. (1942) § 306. When we come to provide for inheritance by issue of deceased grandparents, the civil law system is followed.

It is, of course, recognized that any scheme of intestate succession is, to some extent, arbitrary. It should in the main express what the typical intestate would have wished had he expressed his desires in the form of a will or otherwise. This is a highly speculative matter, and legislators may deem it desirable to modify the scheme herein set out. For a similar scheme of intestate succession set out in a statute which was once drafted for the Conference of Commissioners on Uniform State Laws, see Eagleton, "Introduction to the Intestacy Act and the Dower Rights Act," 20 Iowa L. Rev. 241 (1935); Eagleton, "The Intestacy Act," 20 Iowa L. Rev. 244 (1935).

It will be noticed that this section deals with the net estate and does not include the homestead (§ 42), exempt property (§ 43) or family

allowances (§ 44). See the definition of "net estate" in § 3(r) and of "claims" in § 3(b).

§ 23. Partial intestacy. If part but not all of the estate of a decedent is validly disposed of by will, the part not disposed of by will shall be distributed as provided herein for intestate estates.

§ 24. Kindred of the half blood. Kindred of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood.

Comment. The modern tendency is in the direction of abolishing distinctions between persons of the half blood and the whole blood. In twelve states all distinctions have been abolished, while in a score of others the only distinction is in the case of ancestral estates, persons not of the blood of the ancestor being barred or deferred. This proviso for ancestral estates does not logically fit in with the half blood statute. Thus, the ancestral clause has been applied where none of the claimants were of the half blood. In *re Wortmann's Estate*, 210 Mich. 541, 177 N. W. 967 (1920). In a few states the half bloods take after the whole bloods of the same degree of kinship, while in a few others half bloods take half as much as whole bloods of the same degree. Jurisdictions in which the distinction has been abolished are as follows: D. C. Code (1940) §§ 18-104 and 18-715; Ga. Code Ann. (1936) § 113-903, subd. 5; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 162; Me. Rev. Stat. (1944) c. 156, § 2; Md. Code (1939) art. 93, § 138; Mass. Ann. Laws (1932) c. 190, § 4; N. Y. Dec. Est. Law, § 83, subd. 11; Ohio Gen. Code (Page, 1937) § 10503-4; Ore. Comp. Laws (1940) § 16-204; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 62; Vt. Pub. Laws (1933) § 2967; Wash. Rev. Stat. (1932) § 1347.

§ 25. Afterborn heirs; time of determining relationships. Descendants and other relatives of the intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him. With this exception, the descent and distribution of intestate estates shall be determined by the relationships existing at the time of the death of the intestate.

§ 26. Illegitimate children. For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, the distribution of exempt property and the making of family allowances. When the parents of an illegitimate child shall marry subsequent to his birth, such child shall be deemed to have been made the legitimate child of both of the parents for purposes of intestate succession.

§ 27. Adopted children. For the purpose of inheritance to, through and from a legally adopted child, such child shall be treated the same as if he were the natural child of his adopting parents, and he shall cease to be treated as the child of his natural parents for purposes of intestate succession.

Comment. In some states general provisions as to adoption covering this and other matters may be found outside the probate code. If such statutes exist in a given state, this section should be made to conform with them or should be omitted altogether. An adopted child is not issue (See § 3 (1) hereof); but § 27 gives him rights of issue as to intestate succession.

§ 28. Persons related to intestate through two lines. A person who is related to the intestate through two lines of relationship, though under either one alone he might claim as next of kin, shall, nevertheless, be entitled to only one share which shall be the share based on the relationship which would entitle him to the larger share.

§ 29. Advancements.

(a) **In general.** If a person dies intestate as to all his estate, property which he gave in his lifetime as an advance-

ment to any person who, if the intestate had died at the time of making the advancement, would be entitled to inherit a part of his estate, shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share shall be taken into account in computing the estate to be distributed. Every gratuitous inter vivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement.

(b) Valuation. The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate, whichever first occurs.

(c) Death of advancee before intestate. If the advancee dies before the intestate, leaving a lineal heir who takes from the intestate, the advancement shall be taken into account in the same manner as if it had been made directly to such heir. If such heir is entitled to a lesser share in the estate than the advancee would have been entitled had he survived the intestate, then the heir shall only be charged with such proportion of the advancement as the amount he would have inherited, had there been no advancement, bears to the amount which the advancee would have inherited, had there been no advancement.

Comment. According to the statutes of all but one state, if an intestate in his lifetime makes an advancement to a child, the value of the property so advanced may be charged against the child's intestate share in determining its amount. In a few states this doctrine is applicable to advancements to all heirs. This section so provides, and, in accordance with §§ 3(j) and 22 hereof, a surviving spouse is an heir and therefore can be an advancee. It may be argued that the recognition of an advancement is illogical in that we ordinarily require the formalities of a will to accomplish a variation in the course of intestate succession, because of the danger of fraud and misunderstanding. Yet in the case of the advancement such a variation may be accomplished orally. Doubtless, the justification for a doctrine of advancements is that people will attempt such transactions whether the statutes provide

for them or not, and if no provision for them is made, the intent of donors will often be frustrated. Moreover, the overt act of transferring title by way of advancement is somewhat less likely to be susceptible to fraud or misunderstanding than the execution of an oral will.

In a number of states, a provision is made for a writing stating the terms of the advancement. See, for example, Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 166. No such provision is made here because it is believed the intent of the donor would thereby often be frustrated. But it is provided that a gratuitous inter vivos transfer is presumed not to be an advancement, thus throwing the burden of proving that it is an advancement on the one claiming that an advancement should be charged against an intestate share.

There is authority for the proposition that, where the person to whom an advancement is made dies before the intestate, the advancement is charged to his lineal descendant only if the descendant takes by representation. See *In re Person's Appeal*, 74 Pa. St. 121 (1873). Thus, suppose A makes an advancement to his son B, and B dies before A leaving a son X. When A dies his heirs are his sons C and D and his grandson X. Under most statutes, since X takes by representation, his share is charged with the advancement made to his father. But suppose C and D had died before A and A's heirs at the time of his death were X, and C's children Y and Z. Under § 22 of this Code, and under many statutes, X, Y and Z take per capita. But there would seem to be no sound reason why X should not be charged with the advancement here as well as in the case where he took by representation. Subsection (c) so provides.

Closely related to the law of advancements, and overlapping it, is the law permitting a release of the entire expectancy of the distributee. This doctrine, however, has a common law basis and is broader than the principles of advancements. Thus, an advancement is only to be recognized when the decedent dies intestate as to all his property. But, though a person is testate, it is possible to have a release of the expectancy of a prospective devisee. An advancement is gratuitous, but a release of an expectancy requires fair consideration. Moreover, the doctrine of advancements is applicable only if there are two or more heirs. But, according to Restatement, Property (1940) § 316, comment f, illustration 6, if a release of the expectancy of the sole heir is attempted, it can exclude the heir and the estate will be distributed to the persons who would have been the heirs had the sole heir died before the intestate. See, however, *contra*, *Pylant v. Burns*, 153 Ga. 529, 112 S. E. 455, 28 A.L.R. 423 (1922). In general, as to the release of expectancies, see Restatement, Property (1940) c. 24.

§ 30. Alienage. In making title by descent, it shall be no bar to a person that he, or any person through whom he traces his descent, is, or has been an alien.

§ 31. Dower and curtesy abolished. The estates of dower and curtesy are hereby abolished.

Comment. Estates of curtesy and dower tend to clog land titles and make alienation more difficult. Moreover, at the present time, when so much of the wealth of a decedent is likely to be in the form of bonds and shares, these estates do not make adequate provision for a surviving spouse. For this reason, this section, which is in accordance with modern statutory trends, abolishes dower and curtesy. For the statutes in various states on this subject, see appendix note.

The substitutes for dower and curtesy provided in the Model Code are § 22 (a), the share of the surviving spouse in case of intestacy, and § 32, the spouse's share in case of election against the will. While these shares are ordinarily much more liberal than dower in case of a solvent estate, they are both subject to the decedent's debts.

To the effect that a statute which extinguishes existing inchoate dower interests is not unconstitutional on that ground, see cases collected in 20 A.L.R. 1330. It should be noted that accrued rights are excepted by § 2 (b) hereof. Hence, to the extent that existing dower or curtesy interests are deemed accrued rights, they are excepted from the operation of this Code.

TAKING AGAINST WILL

§ 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

- (a) **Extent of election.** The surviving spouse may elect to receive the share in the estate that would have passed to him had the testator died intestate, until the value of such share shall amount to [\$5,000], and of the residue of the estate above the part from which the full intestate share amounts to [\$5,000],

one-half the estate that would have passed to him had the testator died intestate.

- (b) **Effect of election.** When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as comes to him under the provisions of this section.

Comment. The general plan of subsection (a) follows the provisions for a widow's election against the will as to personal property as provided in Mich. Stat. Ann. § 27.3178(139). Doubtless, a statute of this type can be regarded as caring for the needs of a surviving spouse in that the percentage of the estate given by it is greater in small estates. In a sense it may be said to provide a kind of allowance, subject, however, to the rights of creditors.

In determining how much the surviving spouse is to receive under this section, reference must first be made to § 22. Two illustrations will show how this application is made. Suppose the net estate is \$12,000 and the decedent is survived by a wife and one or more children. Under § 22 (a) (1), if there were no will, the wife would receive one-half the net estate, or \$6,000. In electing to take against the will she receives that amount up to \$5,000, and half of the remainder of her intestate share under § 22(a)(1). This remainder would be \$1,000 (the difference between \$5,000 and \$6,000), half of which would amount to \$500. Therefore, the total share which she may elect to take against the will is \$5,500. Or suppose the decedent's net estate is of the value of \$8,000, and he is survived by a widow and a brother. Under § 22(a)(2) the widow would receive as an intestate share the first \$5,000 of the estate and half the residue, or \$1,500, a total of \$6,500. Under § 32, in electing to take against the will she receives the first \$5,000 of the amount she otherwise would take as an intestate share, and half of the remainder of such amount. Half of this remainder is \$750, making her total share upon election against the will \$5,750.

Subsection (b) is inserted to eliminate a prolific source of litigation. Much difficulty has arisen under some election statutes in determining whether the share which the surviving spouse takes against the will is taken as heir or in some other capacity. This problem has arisen in connection with the construction of devises "to heirs" and in statutes in which the word "heirs" is used with reference to inheritance taxes and many other matters. This subsection specifically states that the surviving spouse takes by descent.

As to the effect of a spouse's election to take an intestate share on other provisions in the will, see comment to § 58 and Restatement, Property (1936) c. 16, topic 2.

In view of the fact that there is no single accepted theory on which statutory provisions for the election of a surviving spouse are based and that a satisfactory statute could be drawn based on entirely different theories from those involved in the above section, it seems desirable to present, as an alternative, the following provisions, which can be substituted for § 32 hereof:

“§ 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

“(a) Net estate not over [\$20,000]. If the value of the net estate does not exceed [\$20,000] and the value of all legacies and devises given absolutely to the surviving spouse plus the value of any portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share is less than half the value of the net estate, then the surviving spouse may elect to receive that amount which, when added to the value of such items, will equal one-half the value of the net estate. In so electing, the surviving spouse is deemed to renounce any legacies and devises not given absolutely.

“(b) Net estate over [\$20,000]. If the value of the net estate exceeds [\$20,000], the surviving spouse may act under the provisions of one or the other, but not both, of the following subdivisions:

“(1) Election to receive one-half with life income from a trust credited at value of principal.

If the value of the net estate exceeds [\$20,000] and if the total value of the legacies and devises given to the surviving spouse, when valued in the manner hereinafter stated, plus the portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share, is less than half the value of the net estate, then the surviving spouse may elect to receive, in addition to all legacies and devises given to him by the will and the intestate share in any portion of the net estate undisposed of by the will, the difference between the value of such items and the value of half the net estate. When, by the terms of the

will, property of the net estate is left in trust with the income to be paid to the surviving spouse for life, the value of such gift, for purposes of determining the amount the surviving spouse is entitled to receive under the will, shall be the value of the principal from which such income is to be paid. All other legacies and devises given to the surviving spouse from the net estate shall be valued at the actual value of the interests given to the surviving spouse.

“(2) Election to receive [\$10,000] in value absolutely. If the value of the net estate exceeds [\$20,000] the surviving spouse may nevertheless treat the net estate as if it were of the value of not over [\$20,000] and make an election in accordance with the provisions of subdivision (a) hereof, provided, however, that the total value of all items which the surviving spouse may receive from the net estate when this election is made shall be [\$10,000] and no more.

“(c) Effect of election. When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as does not come to him by the terms of the will.”

The alternative provisions just stated proceed on the theory that, except in larger estates, a surviving spouse should receive one-half of the estate of a deceased spouse. However, they also follow a modern trend to limit the surviving spouse to a life interest in a trust of half of the estate which the surviving spouse may elect to receive. It is believed that in the case of a smaller estate one spouse probably contributed about as much to its accumulation as the other. Moreover, such a share is in recognition of the strong moral obligation to provide support for a surviving wife. However, it is likely that larger estates were acquired by the testator from some ancestor; and it is deemed fair to permit him to pass them on pretty much as he wishes after he has made adequate provision for the maintenance of the surviving spouse. The plan of limiting the spouse to life interests in the case of larger estates follows legislation in New York and Massachusetts. See Mass. Ann. Laws (1932) c. 191, § 15, and N. Y. Dec. Est. Law, § 18.

The general scheme of this proposed substitution is as follows: If the value of the net estate does not exceed \$20,000, the surviving spouse is entitled to take absolutely one-half the net estate. This amount is first satisfied by crediting to the surviving spouse any part

of the net estate which is undisposed of by the will and which comes to him or her by intestate succession. The surviving spouse is also credited with all legacies and devises given absolutely. These are regarded as being received under the will. If this does not make up one-half, the surviving spouse can elect to take against the will a sufficient additional amount to equal one-half. In so doing the surviving spouse renounces all legacies and devises not given absolutely, such as leases, legal life estates, determinable fees, and future interests. If the value of the net estate exceeds \$20,000, the surviving spouse may elect against the will in either of two ways. He may elect to take \$10,000 absolutely in the same manner as if the estate were valued at \$20,000. In that case, he receives no more, regardless of how large the estate is. The other election against the will gives the surviving spouse one-half of the net estate; but he must take all interests given under the will even though they are not absolute interests. Furthermore, if the will gives the surviving spouse a beneficial interest for life in a trust, that gift is credited to the share of the surviving spouse at the value of the principal from which the life income is payable, and not at the value of the life estate. Thus, it is possible for a testator in an estate in excess of \$20,000 in value, however large it may be, to set up a trust with half his estate, giving his wife only the income for life from that half. The wife must then either accept the beneficial interest under the trust or be limited to taking \$10,000 absolutely.

It should be observed that, although the proposed substitution is quite liberal in permitting a surviving spouse to demand a large share in the estate, it goes much farther than most statutes in compelling a surviving spouse to take what is given under the will. Thus, the tendency to upset a testamentary scheme by an election is minimized as far as is consistent with an adequate provision for the surviving spouse.

By way of comparison, it may be noted that § 32 represents an older but simpler solution of the problem. The proposed substitution is more complicated but goes much farther in leaving a testator's will intact. In both sections, the amounts stated are necessarily somewhat arbitrary and may be varied to suit local needs.

In general, on election by the surviving spouse, see comment to § 40 hereof.

§ 33. Gifts in fraud of marital rights.

(a) **Election to treat as devise.** Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a

testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) **When gift deemed fraudulent.** Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.

Comment. This section makes no attempt to define the expression "in fraud of marital rights." It is believed that only by judicial decision can that be done. Among the situations which courts would have to classify in this connection is that where a married person sets up an inter vivos trust reserving to himself a life estate and a power to revoke the trust. It has sometimes been held that such a transfer could be set aside at the instance of the surviving spouse, particularly where it deprived the settlor of most of his estate. It is sometimes said that the transfer is set aside because it is illusory. See 44 Mich. L. Rev. 151 (1945). But it is believed to be more satisfactory to say that it is fraudulent as to the share of the surviving spouse. A similar problem arises where a married person sets up a so-called savings bank trust. It is believed that no statute could adequately indicate all cases which might properly be regarded as actually or constructively fraudulent as to the share of the surviving spouse.

Subsection (b) lays down an aid in determining whether a gift is fraudulent where the proof is slight. Under this section it is possible to show that a gift made within two years of the death of a married person is not fraudulent, but the burden of proof is upon the person asserting the absence of fraud.

§ 34. Notice of right to elect. It shall be the duty of the clerk of the court, within one month after the will of a married person is admitted to probate, to mail a written notice, directed to the testator's surviving spouse at his last known residence address, informing him of the date before which a written election must be filed by or on behalf of such surviving spouse in order to take against the will.

§ 35. Time limitation for filing election. The election by a surviving spouse to take the share hereinbefore provided may be made at any time within one month after the

expiration of the time limited for the filing of claims; provided that if, at the expiration of such period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of one month after the final determination of the litigation.

§ 36. Form of election; filing. The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

I, A.B., surviving wife (or husband) of C.D., late of the county of _____ and state of _____ do hereby elect to take my legal share in the estate of the said C.D., and I do hereby renounce all provisions in the will of the said C.D. inconsistent herewith.

Signed,

(Acknowledgment)

[Signature]

Comment. If the alternative form proposed in the comment to § 32 is used, the following sentence should be added to the form of election, immediately before the signature:

"If it is determined that the net estate exceeds [\$20,000] in value, I elect to take against the will under the terms of section 32(b)(1) [or section 32(b)(2)]."

§ 37. Right of election personal to surviving spouse. The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised subsequent to his death; but if the surviving spouse is incompetent, the court may order the guardian of his estate to elect for him.

§ 38. Election not subject to change. An election by or on behalf of a surviving spouse to take the share provided in section 32 hereof once made shall be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

§ 39. Waiver of right to elect. The right of election of a surviving spouse hereinbefore given may be waived before or after marriage by a written contract, agreement or waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the thing or the promise given to such waiving party is a fair consideration under all the circumstances. This written contract, agreement or waiver may be filed in the same manner as hereinbefore provided for the filing of an election.

Comment. It is clear that at common law the right of a surviving spouse to take an intestate share against the will may be waived under certain circumstances. But the rules applied to determine the validity of the waiver are unique and involve something quite distinct from the requirements for the execution of a simple contract. This section is designed to express the common-law doctrine. For an analogous doctrine with respect to the release of expectancies generally, see Restatement, Property (1940) § 319, and particularly comment (d) to that section.

§ 40. Election by surviving spouse to take under will. When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of sections 22 and 23 hereof, in any estate undisposed of by the will. By taking under the will or consenting thereto, he shall not thereby waive the rights of homestead, to exempt property or to a family allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights.

Comment. The first sentence of this section is in accord with the general rule that mere expressions in a will of intent to disinherit an heir do not exclude him from the inheritance; there must be an effective devise of the entire estate to someone else. In general, see Phelps, "The Widow's Right of Election in the Estate of her Husband," 37 Mich. L. Rev. 236, 401 (1938-39) and Sayre, "Husband and Wife as Statutory Heirs," 42 Harv. L. Rev. 330 (1929).

The second sentence of this section follows in substance Kan. Gen. Stat. (Supp. 1943) § 59-404.

§ 41. Pretermitted children.

(a) **Children born or adopted after will made.** When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse.

(b) **Children believed to be dead when will made.** If, at the time of the making of his will, the testator believes any of his children to be dead, and fails to provide for such child in his will, the child shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will or from other evidence that the testator would not have devised anything to such child had he known that the child was alive.

Comment. Most pretermitted heir statutes are designed, not to force a moral obligation upon a parent, but to carry out a testator's probable intent. If this is their purpose, then subsection (b) should be limited to the one fact situation therein stated, for it is very unlikely that a testator would, by accident or mistake, omit to provide for a living child in his will, except in the case covered by that subsection. In subsection (b), since extrinsic evidence is necessary to show that the testator believed his child to be dead, it is only reasonable to allow

extrinsic evidence as to his intent to exclude the child. In subsection (a), however, an intent to exclude the child will rarely exist; if it is to be proved, it must be shown from the will.

The last clause in subsection (a) is designed to apply to the following situation. Suppose A has a small estate and feels that he should devise substantially all of it to his wife. He, therefore, so states in his will giving his two children, B and C, one dollar each, and the residue to his wife. Before his death a third child, D, is born. If it were not for the last clause in subsection (a), D would take as a pretermitted heir, but B and C would not. To avoid this obviously unfair result, the last clause was inserted; it is modeled on Tex. Civ. Stat. Ann. (Vernon, 1939) arts. 8291 and 8292.

It should be noted that subsection (a) covers only cases where the *last* will is made before the child is born or adopted. Thus, if a testator makes a will and afterward has children born or adopted and still later executes a second will or a codicil to his will, the facts do not come within subsection (a).

This section makes no provision for omitted grandchildren or more remote issue. See § 3(a).

HOMESTEAD, EXEMPT PROPERTY AND FAMILY ALLOWANCE

§ 42. Homestead. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the homestead to the persons entitled thereto. The homestead so set apart shall not be subject to administration and shall be exempt from all claims against the estate excepting any lien thereon at the time of the decedent's death. The title to the land set apart for the homestead property shall pass, subject to the right of homestead, the same as other property of the decedent and shall be included in the decree of final distribution.

Comment. Statutes or constitutional provisions are found in nearly every state, exempting the homestead from the claims of unsecured creditors. While there is great diversity in these legislative provisions, their principal function appears to be to reserve a residence for the use of the family. See, for example, Mich. Stat. Ann. (1938) § 27.1572.

It is obviously impracticable to work out in detail legislation of this sort as a part of a model probate code. In the first place the homestead law is much broader than the law of decedents' estates. Thus, it deals

with claims of creditors which are asserted by action before the decedent dies; and, also, with claims of creditors of the wife and children of the decedent, if a homestead is subsequently established for them. In the second place, in a number of states, provisions for the homestead are inserted in the constitution, and it is hardly to be expected that these provisions will be amended in the near future. Furthermore, the diversity of legislative provisions for the homestead makes it impossible to indicate in this code more than in barest outline, the relation of the law of decedents' estates to them. Therefore, in this section, homestead is not defined, nor are the requirements for this exemption from the claims of creditors of the decedent stated. But it is assumed that adequate provisions along these lines will be found elsewhere in the statute books.

While in a few jurisdictions the homestead is a fee simple interest, in most states it appears to be either a much more limited possessory estate or else is regarded merely as a privilege of occupation exempt from claims of creditors. In either of these two cases, if the decedent owned the property covered by the homestead in fee, there would be a non-possessory interest not covered by the exemption. According to the last sentence of this section, this interest passes like any other property of the decedent.

If the homestead is limited in value, as is the case in many states, it may be necessary to add provisions for its sale and a division of the proceeds where the property exceeds the value fixed in the statute and is not susceptible of division without injury. See, for example, Mich. Stat. Ann. (1943) §§ 27.3178(520) to 27.3178(522) and Cal. Prob. Code Ann. (Deering, 1944) §§ 664 to 666. Moreover, even if there is no such limitation, it might be desirable to sell, since the surviving members of the family may wish to live somewhere else and there is no reason for forcing them to remain in the homestead in order to retain the benefit of their exemption. For such a statute see Mass. Ann. Laws (1932) c. 188, § 8. If provisions for sale are added, it might be desirable to have a specific statement as to the exemption of the proceeds or of the substituted residence. Of course, if the homestead is regarded as an estate, it should be possible to alienate it without specific legislation. See *Roberts v. First National Bank*, 126 Kan. 503, 268 P. 799 (1928). But in some states it is held that an attempted sale is an abandonment. See *Graves v. Simms Oil Co.*, 189 Ark. 910, 75 S.W. (2d) 809 (1934). Moreover, there may be a question whether the surviving spouse can sell without the consent of minor children. If a section providing for sale of the homestead is desired, the following form might be inserted:

"The surviving spouse may convey the homestead interest and pass good title thereto regardless of the existence of minor children. If the minor children are entitled to possession of the homestead, their interests may be conveyed by the guardians of their estates upon order of the court as in other cases for sale of lands of minors. If two or more minors become entitled to the proceeds of the sale of the homestead interest the proceeds shall be divided between them in proportion to the number of years during which they would otherwise have been entitled to the possession of the homestead."

Commonly the homestead exemption may be asserted against all creditors except lien creditors whose liens attached prior to the death of the decedent. But in some states a mechanic's lien for improvements might attach after the owner dies. See Minn. Stat. (1941) §§ 510.01 and 510.05.

It is thus apparent that in many states a substantial amount of adaptation may be necessary before the provision for the homestead herein presented can be used. Moreover, a legislature might well consider whether it would not be desirable to revise, simplify and rationalize the whole law of homestead exemption, in its relation to exemption statutes generally, to the family allowance and to the provisions for the election of a distributive share by a surviving spouse. But such a task is obviously far beyond that undertaken in this Code.

As to liability of the homestead for debts, see comment to § 44.

§ 43. Distribution of exempt property. The surviving spouse or minor children of a decedent shall be entitled absolutely to such personal property of the estate as may be exempt from execution or forced sale under the constitution and laws of this state or such other personal property as shall be selected, of the total appraised value of [\$2000], whichever is greater, any portion or all of which may be taken in money. Such property shall belong to the surviving spouse, if any, otherwise to the minor children in equal shares. The selection shall be made by the surviving spouse, if living; otherwise by the guardian of the estate of each minor child for such child, or by the court. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the exempt property to the persons entitled

thereto. Such property shall not be subject to administration and shall be exempt from all claims against the estate except any lien thereon at the time of the decedent's death.

Comment. This section, similar to the preceding one on homestead, sets off to the surviving spouse or children, the property exempted to the head of the family under other provisions of the constitution and statutes. Because of the diversity of these provisions, no attempt is made here to enumerate such property. Many of these exemption statutes are now archaic and in view of the tendency to permit a selection of other property or money in lieu of the property so exempt, such a provision is incorporated here. It permits the greatest degree of flexibility in accordance with the needs and desires of the individual members of the family. It also permits the selection of articles of sentimental family value and of an automobile for family use. As to liability of the exempt property for debts, see comment to § 44.

§ 44. Family allowance. In addition to the right to homestead and exempt property the surviving spouse and minor children of a decedent shall be entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration according to their previous standard of living, which allowance must not continue for longer than one year in the case of an insolvent estate. Such allowance may be made upon petition at any time after the filing of the inventory, but a temporary allowance may be made prior thereto in case of great need. The allowance so ordered may be made payable in one payment or in periodic installments, and shall be payable to the surviving spouse, if living, for the use of such surviving spouse and the minor children; otherwise to the guardians or other persons having the care and custody of any minor children; but in case any minor child shall not be living with the surviving spouse, the court may make such division of the allowance for maintenance as it deems just and equitable.

Comment. The purpose of this section is to provide an allowance to the surviving spouse and minor children of the decedent during the period of administration for their support in the manner to which they

have been accustomed. See § 142, providing that administration and funeral expenses have priority over the family allowance; but the homestead and exempt property are not liable for these expenses, and do not constitute assets for any purpose except to benefit the family.

EXECUTION AND REVOCATION OF WILLS

§ 45. Who may make. Any person of sound mind eighteen years of age or older may make a will.

Comment. Sections 45 to 50 inclusive are §§ 2 to 7 inclusive of the Model Execution of Wills Act.

§ 46. Who may witness.

(a) Any person competent to be a witness generally in this state may act as attesting witness to a will.

(b) No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two disinterested witnesses, forfeit so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the testator's death, what he would have received had the testator died intestate.

(c) No attesting witness is interested unless the will gives to him some personal and beneficial interest.

§ 47. Execution. The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two witnesses as follows:

(a) Testator. The testator shall signify to the attesting witnesses that the instrument is his will and either

- (1) Himself sign, or
- (2) Acknowledge his signature already made, or
- (3) At his direction and in his presence have someone else sign his name for him, and
- (4) In any of the above cases the act must be done in the presence of two or more attesting witnesses.

- (b) **Witnesses.** The attesting witnesses must sign
- (1) In the presence of the testator, and
 - (2) In the presence of each other.

§ 48. Holographic will. No witness to a holographic will is necessary, but the signature and all its material provisions must be in the handwriting of the testator and his handwriting must be proved by two witnesses.

§ 49. Nuncupative will.

(a) A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the impending peril, and must be

- (1) Declared to be his will by the testator before two disinterested witnesses;
- (2) Reduced to writing by or under the direction of one of the witnesses within thirty days after such declaration; and
- (3) Submitted for probate within six months after the death of the testator.

(b) The nuncupative will may dispose of personal property only and to an aggregate value not exceeding one thousand (\$1000) dollars, except that in the case of persons in active military, air or naval service in time of war the aggregate amount may be ten thousand (\$10,000) dollars.

(c) A nuncupative will neither revokes nor changes an existing written will.

§ 50. Foreign execution. A will executed outside this state in a manner prescribed by this [Code], or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution, shall have the same force and effect

in this state as if executed in this state in compliance with the provisions of this [Code].

§ 51. Revocation by written will or by act on document. A will, or any part thereof, can be revoked

- (a) By a written will; or
- (b) By being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator and the facts of such injury or destruction must be proved by two witnesses.

§ 52. Revocation of nuncupative will. A nuncupative will or any part thereof can be revoked by another nuncupative will.

§ 53. Change in circumstances; divorce. If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked. With this exception, no written will, nor any part thereof, can be revoked by any change in the circumstances or condition of the testator.

Comment. In some states the statute on revocation includes a statement to the effect that "nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." See, for example, Mich. Stat. Ann. (1943) § 27.3178(79). Moreover, such a doctrine is sometimes implied in the absence of any statement to the contrary in the statute. In either case, the result is believed to be unsatisfactory. Such a doctrine introduces an undesirable element of uncertainty into the question of the validity of a duly executed will. No revocation by circumstances should be permitted except on such grounds as are specifically named in the statute and these grounds should be as few as possible. Section 54 of this Code makes the grounds for revocation named in the statute exclusive.

In a number of jurisdictions, marriage of the testator, or marriage and birth of issue, revoke a will. Such a provision is believed to be unnecessary in this Code. Section 32 allows a surviving spouse to elect to take a share of the estate against the will. And § 41 provides for afterborn children taking an intestate share against the will. These sections are believed to be adequate to protect a surviving spouse or afterborn children. The only extrinsic circumstance which revokes a will, under the provisions of this Code, is a divorce. Legislation to the effect that a divorce revokes a will is not common, but does exist in a few states. See Kan. Gen. Stat. (Supp., 1943) § 59-610; Minn. Stat. (1941) § 525.191; Wash. Rev. Stat. (1932) § 1399. In general, as to revocation of a will by circumstances, see Durfee, "Revocation of Wills by Subsequent Change in the Condition or Circumstances of Testator," 40 Mich. L. Rev. 406 (1942).

§ 54. Specific provisions for revocation exclusive. No will, nor any part thereof, can be revoked except as specifically provided in sections 51 to 53 hereof.

§ 55. Revival of revoked or invalid will. No will, nor any part thereof, which shall be in any manner revoked, or which shall be or become invalid, can be revived otherwise than by a re-execution thereof, or by the execution of another will in which the revoked or invalid will or part thereof is incorporated by reference.

MISCELLANEOUS PROVISIONS

§ 56. Will to operate on after-acquired property. Any estate, right or interest in land or other things acquired by the testator after the making of his will may pass thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator.

Comment. This section is modeled after Cal. Prob. Code Ann. (Deering, 1944) § 121. Prior to the English Wills Act of 1837, 7 Wm. 4 and 1 Vict. c. 26, a will did not pass real estate acquired by the testator after its execution. As to the history of this matter, see Warren, "The History of Ademption," 25 Iowa L. Rev. 290 (1940).

Hence legislation is desirable to make it clear that after-acquired real estate can pass by a will. This result was accomplished in § 3 of the English Wills Act of 1837 by a provision to the effect that it is lawful for every person to devise or bequeath all real and personal estate to which he shall be entitled at the time of his death.

§ 57. Failure of testamentary provisions by lapse or otherwise.

(a) **General rule.** If a devise of real or personal property, not included in the residuary clause of the will, is void, is revoked, or lapses, it shall become a part of the residue, and shall pass to the residuary devisee, unless a contrary intent is indicated by the terms of the will.

(b) **Avoidance of failure of devise when devisee dies before testator.** Unless a contrary intent is indicated by the will, when any adopted child of the testator or blood relative within the fourth degree

- (1) Is designated as a devisee, or
- (2) Would have been a devisee under the terms of a class gift, had he survived the testator,

and such adopted child or blood relative dies after the making of the will and before the testator leaving issue surviving the testator, or is dead at the making of the will leaving issue surviving the testator and the fact of his death is unknown to the testator, then such issue as represent the deceased devisee shall be deemed substituted for him so as to take the interest under the will which their deceased ancestor would have taken had he survived.

Comment. Lapse statutes of varying scope are found in a large majority of the states. One of the questions most commonly litigated with respect to such statutes concerns their application to class gifts. Do they apply to class gifts at all? If they do apply, to what extent do they apply to potential members of the class who are dead when the will is made? In a few jurisdictions, where the lapse statute makes no reference to class gifts, it is held that the lapse statute has no application to such gifts, because there is in fact no lapse. Thus, if the testator devises the residue of his estate to the children of A, it is

said that such language means "the children of A who are living at the death of the testator." Hence, if potential members of the class die before the testator, they never were within the terms of the devise and so no problem of lapse arises. Most courts, however, do apply lapse statutes to class gifts where a potential member of the class dies before the testator but after the will is executed. The reason would seem to be that to do so helps to effectuate the testator's desires.

The most serious difficulty in applying lapse statutes arises where a potential member of the class dies before the will is executed. In the case of a devise to a named person who dies before the will is made, such as a testamentary gift of a piece of land or a sum of money to A, it is evident that the testator supposed A was alive when he made his will or A would not have been named as a devisee. Therefore, in a proper case, it would effectuate the testator's intention to apply the lapse statute to the devise to A. But suppose the testator devises a portion of his estate "to the children of A," and at the time the will is executed A has four children, and has had two others who died more than ten years before the execution of the will, leaving issue. It would seem highly unlikely that the testator would intend to include the children already dead within the phrase "children of A." Indeed, practically the only case in which he would intend to include potential members of the class dead when the will is executed is a case where he does not know they are dead. This section of the Code limits the application of the lapse statute to such cases, and is believed to avoid most of the litigation concerning class gifts which commonly arises in connection with such statutes.

In general, as to the application of lapse statutes to class gifts, see Restatement, Property (1940) § 298, together with comments and special notes thereto.

As to what issue "represent the deceased devisee," see the definition of "representation" in § 22(c) hereof.

§ 58. Renunciation by heir or devisee. An heir or devisee may renounce the succession to the real and personal property of a decedent, but the renunciation shall be subject to the rights of creditors of the heir or devisee and of the taxing authorities. In case of an effective renunciation by the heir, the property shall descend as if he had died before the decedent.

Comment. At common law a devisee could renounce but an heir could not as to land. The rule as to the devisee is here stated prin-

cipally because it might otherwise be implied that a statute as to renunciation by the heir repeals the common law rule permitting a devisee to renounce. No good reason is perceived why the heir as well as the devisee should not be permitted to renounce.

However, neither the heir nor the devisee should be permitted to prejudice his creditors or the taxing authorities by a renunciation. The common law is not clear as to whether the devisee is able to defeat the rights of creditors and taxing authorities. Hence, this section makes express provision on that point.

The effect of the renunciation by a devisee on other distributees of the decedent's estate is a matter of common law and is too complex a matter to be dealt with satisfactorily in a statute. Thus, if the interest renounced is a life estate, the whole question of the acceleration of future interests is involved. See, as to that matter, Restatement, Property (1936) c. 16, topic 2. Moreover, if the interest renounced is an interest in joint tenancy in fee simple, it would commonly devolve upon other joint tenants. If the interest renounced is given in severalty in fee simple or absolutely, it would ordinarily fall into the residuary estate unless it were a part of the residuary estate or there were no residuary clause in the will. In the latter case, the renounced interest would commonly devolve upon the heir.

§ 59. Deposit of will with court in testator's lifetime.

(a) **Deposit of will.** A will may be deposited by the person making it, or by some person for him, with any [] court, to be safely kept until delivered or disposed of as hereinafter provided. The clerk of the court, on being paid the fee of [one dollar] therefor, shall receive and keep such will, and give a certificate of deposit for it.

(b) **How enclosed.** Every will intended to be deposited as aforesaid shall be enclosed in a sealed wrapper, which shall have indorsed thereon "Will of," followed by the name of the testator. The clerk of the court shall indorse thereon the day when, and the person by whom, it was delivered. The wrapper may also be indorsed with the name of the person to whom the will is to be delivered after the death of the testator. It shall not be opened or read until delivered to a person entitled to receive it, or otherwise disposed of as hereinafter provided.

(c) **To whom delivered.** During the lifetime of the testator, such will shall be delivered only to him, or to some person authorized by him by an order in writing duly proved by the oath of a subscribing witness. After his death, the clerk shall notify the person named in the indorsement on the wrapper of the will, if there be a person so named, and deliver it to him.

(d) **When will to be opened.** If the will is not delivered to a person named in the indorsement on the wrapper, it shall be publicly opened in the court within thirty days after notice of the testator's death, and be retained by the court until offered for probate. Notice shall be given to the executor named therein and to such other persons as the court may designate. If the proper venue is in another court, the will shall be transmitted to such court; but before such transmission a true copy thereof shall be made and retained in the court in which the will was deposited.

Comment. Statutes of this kind appeared early in American statute books. See N.Y. Rev. Stat. (1829) part 3, c. 7, t. 3, art. 7, §§ 67-70; Mass. Rev. Stat. (1836) part II, t. 3, c. 62, §§ 10-13. Many states still have such legislation. The principal object of enacting such a statute is to protect a testator who fears that his will may be lost or wrongfully destroyed before it can be probated. The statute presented herewith is modeled after Ohio Gen. Code (Page, 1937) §§ 10504-6 to 10504-9. The last subsection also contains some clauses found in Minn. Stat. (1941) § 525.22.

It is possible that a provision might be added to the effect that the court should keep an index of all wills deposited under the provisions of this section. See N. H. Rev. Laws (1942) c. 350, § 18, for such a provision. However, in many localities little use will be made of this section, and if the wills deposited under it are filed alphabetically, that would seem to be sufficient. If something more is thought desirable, this can be taken care of by rule of court.

§ 60. Construction of will. The court in which a will is probated shall have jurisdiction to construe it at any time during the administration. Such construction may be made

on the petition of the personal representative or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed, notice of the hearing thereon shall be given to interested persons.

Comment. This section does not preclude the construction of a will in a proper case in suits other than probate proceedings.

PART III. ADMINISTRATION OF DECEDENTS' ESTATES

PROBATE AND GRANT OF ADMINISTRATION

§ 61. Venue.

(a) **Proper county.** The venue for the probate of a will and for administration shall be

- (1) In the county in this state where the decedent had his domicile at the time of his death.
- (2) If the decedent had no domicile in this state, then in any county wherein he left any property or into which any property belonging to his estate may have come.

(b) **Proceedings in more than one county.** If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced shall extend to all of the property of the estate in this state.

(c) **Transfer of proceeding.** If it appears to the court at any time before the decree of final distribution in any pro-

ceeding that the proceeding was commenced in the wrong county or that it would be for the best interests of the estate, the court, in its discretion, may order the proceeding with all papers, files and a certified copy of all orders therein transferred to another [] court which other court shall thereupon proceed to complete the administration proceeding as if originally commenced therein.

Comment. Subsection (a) follows closely the language of Minn. Stat. (1941) § 525.82 and Kan. Gen. Stat. (Supp. 1943) § 59-2203.

Subsection (b) is designed to resolve conflicts between probate courts of different counties in the same state. Its language also corresponds closely to the above statutes of Minnesota and Kansas.

As between concurrent proceedings, it is a common provision of statutes to provide for priority in favor of the one "first commenced" or some similar phrase. But all too often there is no statement as to what constitutes the commencement of a proceeding. This has resulted in two views, diametrically opposed, one holding that the proceeding is commenced by the filing of a petition, the other that the proceeding is not commenced until the court acts on the petition by appointing a personal representative. A few statutes explicitly provide that the filing of the petition operates as a commencement of the proceeding. Others resolve priority upon the filing of a petition in cases where there is an alternative venue. The last sentence of subsection (b) is intended to define the manner in which and the point of time when a proceeding is commenced. In addition it provides that one administration extends to all property of the estate throughout the state, in order to preclude the practice of having an administration in every county in which any property of the decedent is located.

Subsection (c) providing for transfer of venue is intended to make possible the transfer at any time of a proceeding to another county when it is in the best interests of the estate or when it appears that the proceeding was commenced in the wrong county. Thus convenience, the prime purpose of venue, is made possible during the entire period of administration. Similar provisions are found in Minn. Stat. (1941) § 525.57 for the transfer of guardianship proceedings; in Mass. Ann. Laws (1932) c. 215, § 8A for the transfer of an administration proceeding, at any time before final decree, when originally begun in the wrong county; and in Ark. Dig. Stat. (1937) §§ 229 to 238, upon application of the administrator or of a majority of the heirs, upon proof that the greater portion of the property of the

estate is in another county or merely that the larger portion of the heirs wish such removal.

For a discussion of the subject matter of this section, together with the citation of authorities showing conflicting views, see Basye, "The Venue of Probate and Administration Proceedings," 43 Mich. L. Rev. 471 (1944).

§ 62. Character of proceeding. The administration of the estate of a decedent from the filing of the petition for probate and administration or for administration until the decree of final distribution and the discharge of the last personal representative shall be considered as one proceeding for purposes of jurisdiction. Such entire proceeding is a proceeding in rem. No notice shall be jurisdictional except as provided in sections 69 and 70.

Comment. By the great weight of authority a proceeding for the administration of the estate of a deceased person is a proceeding in rem. For this reason personal service on interested persons is not necessary to give the court jurisdiction. Indeed, in many cases personal service on all interested persons is quite impossible. It has also frequently been held that the entire course of administration is one proceeding, thus eliminating any jurisdictional requirements as to subsequent notice. See Simes, "The Administration of a Decedent's Estate as a Proceeding in Rem," 43 Mich. L. Rev. 675 (1945). Of course, in those states where the probate court does not assume jurisdiction of the land of the decedent, except where it is necessary to sell it to pay debts and legacies, it has sometimes been held that the proceeding to sell land is an independent proceeding. However, the scheme contemplated in this Code assumes that the court takes jurisdiction of the land of the decedent as well as his personalty from the start. It is true, special provisions are hereafter made for notice of proceedings to sell land. But it would seem that they should be comparable to an execution sale pursuant to a money judgment in a civil action at law, in that they constitute one step in a judicial proceeding already initiated. Thus in the example of the execution sale no notice is necessary for jurisdiction to complete the sale. The proceeding is still a unit though a will of the same decedent is later discovered and probated or though a successor personal representative is appointed and qualifies. However, this section does not apply where adverse interests of third parties in the estate are being litigated. See §§ 130 and 162 hereof.

Throughout this Code the term "proceeding," when used in connection with probate or administration matters, indicates the entire course of probate and administration of an estate. However, the term "proceedings" is often used to indicate various steps which are only parts of such proceeding.

§ 63. Duty of custodian of will; liability. After the death of a testator the person having custody of his will shall deliver it to the court which has jurisdiction of the estate. Every person who wilfully refuses or fails to deliver a will after being duly ordered by the court to do so shall be guilty of contempt of court. He shall also be liable to any party aggrieved for the damages which may be sustained by such refusal or failure.

Comment. Statutes in practically every state provide that the custodian of a will may be compelled to produce it. Some stop with a general statement, while others go into more or less detail. In some jurisdictions criminal penalties are provided for the refusal to produce a will. The statute here presented is almost identical with Kan. Gen. Stat. (Supp. 1943) § 59-621.

§ 64. Petition for probate and appointment of personal representative; who may petition. Any interested person may petition the court of a proper county

- (a) To have the will admitted to probate, whether the same is written or unwritten, in his possession or not, is lost, is destroyed or is without the state;
- (b) For the appointment of an executor if one is designated in the will;
- (c) For the appointment of an administrator, if no executor is designated in the will, or if the person so named is disqualified or unsuitable, or refuses to serve, or if there is no will.

A petition for probate may be combined with a petition for the appointment of an executor or administrator; and a person interested in either the probate of the will or in the appointment of a personal representative may petition for both.

Comment. A person interested in the appointment of a personal representative is not necessarily interested in the probate of the will. This is true of a creditor of the decedent. However, creditors are interested in obtaining the appointment of a personal representative in order to obtain proceeds of the estate, and under the section are proper persons to petition for probate as well as for the appointment either of an executor or an administrator.

§ 65. Contents of petition for probate and appointment of personal representative. A petition for probate of a will or for the original appointment of a general personal representative or for both shall state:

- (a) The name, age, domicile and date of death of the decedent;
- (b) The names, ages and residence addresses of the heirs and devisees, if any, so far as known or can with reasonable diligence be ascertained;
- (c) The probable value of the real and of the personal property;
- (d) If the decedent was not domiciled in the state at the time of his death, what property is within the county in which the petition is filed;
- (e) If the decedent died testate and the will has not been delivered to the court, the contents of the will, either by attaching a copy of it to the petition, or, if the will is unwritten, lost, destroyed or suppressed, by including a statement of the provisions of the will so far as known;
- (f) The names and residence addresses of the persons, if any, named as executors; and
- (g) If the appointment of a personal representative is sought, the name and residence address of the person for whom letters are prayed; and his relationship to the decedent or other facts, if any, which entitle such person to appointment.

Comment. It may be deemed desirable for the judges having probate jurisdiction to promulgate standard forms for petitions for

probate and for the appointment of a personal representative. This can be done under the powers given in § 10 of this Code.

§ 66. Demand for notice of proceedings for probate or appointment of personal representative. If any interested person desires to be notified before a will is admitted to probate or before a general personal representative is appointed, he may file a demand for notice with the court. No demand for notice is effective unless it contains a statement of the interest of the person filing it, and his address or that of his attorney. After filing the same, no will shall be admitted to probate and no personal representative shall be appointed, other than a special administrator, until the notice provided for in section 69 hereof has been given.

Comment. This section has been developed from the device used in the English ecclesiastical and probate courts, known as a caveat. The caveat is also provided for in a number of jurisdictions in this country. Where, as in this Code, provision is made for probate and grant of administration without notice, the caveat, or something comparable to it, is a desirable safeguard for the protection of interested persons who otherwise may not have notice of the hearing. There is no reason, however, why the caveat should not be applied to the appointment of the personal representative as well as to the probate of the will. Provision for this has accordingly been made in this section of the Code.

§ 67. Request for special notice of hearings. At any time after the issuance of letters, any person interested in the estate may, in person or by attorney, serve upon the personal representative, or upon his attorney, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of such service, a written request, stating that he desires written notice by ordinary mail of the time and place of all hearings on the settlement of accounts, on final distribution, and on any other matters for which any notice is required by law, by rule of court or by an order in the particular case. The applicant for such notice must include in his writ-

ten request his post office address or that of his attorney. Unless the court otherwise directs, upon filing such request such person shall be entitled to notice of all hearings for which any notice is required as aforesaid, or of such of those hearings as he designates in his request.

Comment. This section is modeled after Cal. Prob. Code Ann. (Deering, 1944) § 1202.

§ 68. Hearing on petition without notice. Upon filing the petition for probate or for the appointment of a general personal representative, if no demand for notice has been filed as provided in section 66, and if such petition is not opposed by any interested person, the court may, in its discretion, hear it forthwith or at such time and place as it may direct, without requiring notice.

Comment. This and the sections which immediately follow it are drawn on the theory that it is desirable to permit a summary hearing on an application for probate or administration, and that such hearing is permissible without any notice whatever. This was the English probate in common form and has been followed in a considerable number of states. It is still a part of the English probate system. On the other hand, a large number of states require notice before any hearing can be had other than for a grant of special administration. A hearing without notice permits an immediate supervision of the estate of the decedent as soon as his death occurs. In jurisdictions requiring notice that result may be obtained only when a special administrator is appointed,—often a cumbersome and expensive procedure. On the other hand, it may be said that in the summary proceeding without notice, there is danger that unscrupulous persons get control of the estate. However, this danger is largely obviated by the fact that the judge may always, in his discretion, require notice before the hearing. Moreover, control by an improper person is not likely to continue long in view of the provision of § 70 requiring notice of the appointment of the personal representative as soon as letters are issued. In Florida, where probate without notice is permitted, notice of the admission of a will to probate may be made on the request of the personal representative or any other interested person. Fla. Stat. Ann. (1941) § 732.28. In other states the personal representative is sometimes required to give notice of his appointment. In general, as to the requirement of notice, see 43 Mich. L. Rev. 1153 (1945).

If a court should deem it advisable, a general rule requiring notice in all cases unless otherwise ordered could be promulgated under the provisions of §§ 10 and 14 hereof.

§ 69. Notice of hearing on petition.

(a) **When and to whom notice given.** If the petition for probate or for the appointment of a general personal representative is opposed, or if a demand for notice has been filed, under the provisions of section 66 hereof, the court must, and in all other cases the court may, fix a time and place for a hearing on such petition, and direct

- (1) That notice be given by publication and
- (2) That a copy of such notice be served personally or by registered mail on each heir and devisee whose name and address is known and on each person who has filed such demand for notice.

(b) **Notice to alleged decedent.** If it appears by the petition or otherwise that the fact of the death of the person whose estate is to be administered may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the last known residence address of the alleged decedent.

(c) **Form of notice.** The publication of notice required by this section shall include a notice to creditors of the decedent to file their claims in the court or be forever barred; and shall be substantially in the following form:

In the [] court, ——— county,
State of ———.

Estate of ———, deceased

To all persons interested in the Estate of ———,
and to the said ———, if he be not deceased:

You are hereby notified that a petition has been filed in said court [to admit to probate the will of ———, and]
for the appointment of a personal representative for said estate;
that said petition will be heard at ——— on

the _____ day of _____, 19—, or at such subsequent time or other place to which said hearing may be adjourned or transferred.

All persons having claims against said estate are hereby notified to file the same in said court within four months from the date of the first publication of this notice or be forever barred.

Date _____

Clerk of the [] Court for

County, _____

Comment. This section makes provision for notice when there is a contest or when a demand for notice has been filed, or when the court determines that it would be desirable. If notice is ordered, then this notice accomplishes two things: it notifies interested parties of the beginning of the proceeding; it also notifies creditors to come in and present their claims. In this way the expense of a separate publication of notice to creditors is eliminated. The part of the notice which is bracketed is to be omitted if there is no will.

This section is designed to give the court jurisdiction over the property even if the person whose estate is to be administered be not deceased. Subsection (b) provides for notice to him; and the form set out in subsection (c) provides that he be made a party. It should be pointed out that, under the provisions of § 81, *infra*, even if the court has jurisdiction over the presumed decedent when he is not, in fact, dead, he has a very good chance of recovering back his property. . However, his attack on the probate proceeding must be direct; he cannot make a collateral attack. Thus, the personal representative who has acted in good faith is protected.

§ 70. Notice of appointment of personal representative. In all cases where notice by publication of the hearing on the petition for probate or for the appointment of a general personal representative has not been given, the clerk shall, as soon as general letters are issued, cause to be published a notice of the appointment of the personal representative, in which shall be included a notice to creditors of the decedent to file their claims in the court or be forever barred. A copy.

of such notice shall also be served personally or by registered mail on each heir and devisee whose name and address is known. Such notice shall be in substantially the following form:

In the [] court of _____ county,
State of _____.

Estate of _____, deceased

To all persons interested in the Estate of _____,
and to the said _____, if he be not deceased:

You are hereby notified that on the ____ day of _____,
19____, [the last will of _____ was admitted to
probate and that] _____ was appointed the
[executor] administrator of the estate of _____,
deceased.

All persons having claims against said estate are hereby notified to file the same in said court within four months from the date of the first publication of this notice or be forever barred.

Date _____

Clerk of the [] Court for
_____ County, _____

Comment. This is the notice which is to be given if the first hearing is without notice by publication. Thus notice is given to interested persons in all cases very early in the proceeding, and in time to make good any objections they may have to the probate or to the appointment of the personal representative.

§ 71. Search for alleged decedent. Whenever there is any doubt that the person whose estate is to be administered is dead, the court, upon application of any interested person, may direct the personal representative to make search for the alleged decedent in any manner which the court may deem advisable, including any or all of the following methods:

- (a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;
- (b) By notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;
- (c) By engaging the services of an investigation agency.

Comment. This section is inserted because the proceeding makes the alleged decedent a party and is intended to bind him. If the court exercises a sound discretion in ordering notice as provided in this section, it is clear that due process requirements are complied with in so far as the alleged decedent's property is concerned. Indeed, the inclusion of the decedent as a party to the notice by publication would seem to amount to a compliance with due process requirements. See the comment to § 81.

This section is modeled after § 5 of the Uniform Absence as Evidence of Death and Absentees' Property Act as promulgated by the Conference of Commissioners on Uniform State Laws. It does not, however, take the place of the uniform act. This section would be used only where the alleged decedent is believed to be dead and where it is desirable to have the whole matter determined in one probate proceeding.

§ 72. How will is contested. Any interested person may contest the probate of a will by stating in writing the grounds of his objection thereto and filing the same in the court.

Comment. No attempt is made to enumerate the grounds of contest. See, however, § 80. This section, of course, implies the well recognized proposition that a part of a will can be contested. See 69 A.L.R. 1129 and 32 Yale L.J. 294 (1923).

§ 73. Time within which contest must be filed. No will can be contested unless the grounds of objection are filed within the periods hereinafter provided.

- (a) If the ground of objection is that another will of the decedent has been discovered, the ground of objection must be filed before final distribution of the estate is decreed and within the period stated in section 83.

- (b) If the contest is on any other ground, and
 - (1) If notice of the hearing of the petition for probate has been given as provided in section 69, the grounds of objection must be filed at or before the time of the hearing on the petition for probate.
 - (2) If notice of the hearing of the petition for probate has not been given as provided in section 69, the grounds of objection must be filed within four months after the first publication of the notice of appointment of the personal representative.

Comment. See comment to § 75 as to another will subsequently produced.

§ 74. Notice of contest.

(a) **Contest before probate.** If a statement of grounds of objection to admitting the will to probate is filed before it has been admitted, and the court has already ordered the notice provided for in section 69, no further notice is necessary unless ordered by the court. If the court has not already ordered the notice provided for in section 69, the notice therein provided for shall be given, and the notice shall further state that the will is being contested.

(b) **Contest after probate.** If a statement of objection to admitting the will to probate is filed after the will has been admitted and within the time limitations stated in section 73, the court shall fix a time and place for hearing the same and shall direct that notice be given to each heir and devisee whose place of residence is known, and, if the grounds for contest include the presentation of another will, to each devisee in such other will, whose place of residence is known, and to such other persons as the court may direct.

Comment. See comment to § 75.

§ 75. Will subsequently presented for probate.

(a) **Where original petition not yet heard.** If, after a petition for the probate of a will or for the appointment of a general personal representative has been filed, and before such petition has been heard, a petition for the probate of a will of the decedent, not theretofore presented for probate, is filed, the court shall hear both petitions together and determine what instruments, if any, should be admitted to probate or whether the decedent died intestate.

(b) **Where one will already admitted or administration granted.** If, after a will has been admitted to probate or after letters of administration have been granted, a petition for the probate of a will of the decedent, not theretofore presented for probate is filed, the court shall determine whether the former probate or the former grant of letters should be revoked and whether such other will should be admitted to probate or whether the decedent died intestate.

(c) **Time limitation on probate under this section.** No will shall be admitted to probate under the provisions of this section unless it is presented for probate before the court decrees final distribution of the estate.

(d) **Character of proceedings under this section; notice.** When a will is presented for probate under the provisions of this section, the proceedings shall be deemed a part of the proceedings for probate or for administration already initiated. If notice by publication has been ordered as provided in section 69 or in section 70, no further notice by publication is necessary unless ordered by the court; but the court shall direct that notice of the hearing be given to each heir and to each devisee in this or in any other will offered for or admitted to probate, whose place of residence is known, and to such other persons as the court may direct.

Comment. This section and §§ 73 and 74 on contest overlap somewhat, but all are necessary. A subsequently presented will may

have a double function; it may revoke a prior will, and thus be the basis of a contest of that prior will, and it may also contain dispositive provisions which the proponent wishes to have recognized by securing its probate. Sections 73, 74 and 75 all take the position that the contest of the old will and the probate of the new are both determined at the same hearing.

However, the attempted probate of another will may not necessarily constitute a contest of the first. Thus, if the testator makes one will disposing of all his real estate and another will disposing of all his personal estate, these wills are obviously not inconsistent. Nevertheless, since the order admitting the first of these wills to probate would be a determination that such will was the testator's last and only will and that as to all property not covered by it he died intestate, it would be necessary to reopen the order or judgment made at the first hearing, but it would not be necessary to revoke the probate of the first will.

Much confusion exists in the statutes and cases as to the matter of introducing a subsequent will. Some jurisdictions bar it by the ordinary period of contest; others allow it to be introduced after the period for contest has expired; some allow it to be probated at any time. Logically, it would seem that it does not differ from any other newly discovered evidence, and that time limitations on contest should apply to it. On the other hand, if a later will is discovered before the order of distribution, it seems reasonable that it should be admitted. This Code takes the latter position.

§ 76. Testimony of subscribing witnesses. If the probate of a written, attested will is contested, at least two of the subscribing witnesses shall be examined if they are within the state and competent and able to testify. If the will is not contested, at least one of the subscribing witnesses shall be examined if such witness is within the state and competent and able to testify.

§ 77. Proof of written attested will by other evidence. The provisions of section 76 as to the testimony of subscribing witnesses shall not exclude the production of other evidence at the hearing on the petition for probate; and the due execution of the will may be proved by such other evidence.

Comment. Common-law rules as to the proof of the execution of wills are assumed to be in force without the necessity of any statute.

Thus, if attesting witnesses are not available, it is possible to prove the genuineness of their signatures and to raise a presumption that the will was duly executed. 5 Wigmore, Evidence (3d ed., 1940) §§ 1511, 1512: This section is designed to indicate that such rules are in force.

§ 78. Commission to take testimony of subscribing witnesses. When it is inconvenient for one or more of the subscribing witnesses to a written, attested will to be present at a hearing with respect to the probate of such will, or where such witness or witnesses are without the state, the court may, if there be no contest, issue a commission to take the testimony of such witness or witnesses, either without notice or upon such notice as the court shall direct. If there is a contest with respect to the probate of the will, a commission may be issued in accordance with the practice in civil actions.

§ 79. Proof of holographic or nuncupative will. Proof of holographic and nuncupative wills are subject to the requirements of sections 48 and 49 of this Code.

Comment. This provision is inserted because of the terms of the Model Execution of Wills Act, which appears as §§ 45 to 50 of this Code.

§ 80. Proof required for probate and for grant of administration.

(a) **On petition for probate.** On a petition for the probate of a will, if the court finds that the testator is dead and that the will was executed in all respects according to law when the testator was competent to do so and was not acting under undue influence, fraud or restraint, and does not find that the will was revoked the will shall be admitted to probate as the last will of the testator.

(b) **On petition for appointment of personal representative.** On a petition for the appointment of an executor or general administrator the court shall determine whether the

deceased died testate or intestate and shall grant letters accordingly or, on proper grounds, may deny the petition.

§ 81. Effect of probate or grant of administration. If the court determines the facts as provided in section 80, such order shall, if uncontested or unappealed from, be final, subject to the following exceptions:

- (a) It may be reopened at any time prior to the decree of final distribution for the purpose of admitting a will to probate not theretofore presented to the court;
- (b) It may be vacated or modified for good cause as provided in section 19;
- (c) The finding of the fact of death shall be conclusive as to the alleged decedent only if (1) the notice of the hearing on the petition for probate or for the appointment of a personal representative is sent by registered mail addressed to the alleged decedent at his last known residence address and (2), when search is ordered for the alleged decedent as provided in section 71, the court finds that the search was made. If such notice is sent and search made, and the alleged decedent is not dead, he may nevertheless at any time recover the estate from the personal representative if it be in his hands, or he may recover the estate or its proceeds from the distributees, if either be in their hands.

Comment. The effect of the first part of this section is to say that the order admitting a will to probate determines that it is the last and only effective will of the testator and that the order granting administration to a personal representative, when no will is admitted to probate, determines that the decedent died intestate. Hence, any presentation of a will at a later time can be made only by reopening the order admitting the first will to probate or the order granting administration. However, the later will may be admitted by reopening the order at any time before the decree of final distribution is made.

The third exception to the conclusiveness of these orders is with respect to the fact of death. According to the decision in the case of *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894), an ordinary probate proceeding in which the alleged decedent is not made a party and is not given notice does not bind him, and he may attack the whole proceeding collaterally. This is because due process requirements have not been complied with. But if reasonable notice is given to the alleged decedent, and he is made a party to the proceeding, he is bound. The form of notice provided for in this Code makes the alleged decedent a party; and if the steps referred to in exception (c) hereof are taken, he would receive reasonable notice. This simply means that he is bound by the proceeding and cannot attack it collaterally. But, according to the provisions of this section, he can recover his property back to the extent that it is in the hands of the personal representative or distributees. He cannot recover it back from creditors, and the personal representative is protected to the extent that he acted in good faith.

§ 82. Certificate of probate. When proved as herein provided, every written will, if in the custody of the court, shall have endorsed thereon or annexed thereto a certificate by the court of such order of probate. If for any reason a written will is not in the custody of the court, or if the will is oral, the court shall find the contents thereof, and the order admitting the will to probate shall state the contents and a certificate shall be annexed as above provided. Every will certified as herein provided, or the record thereof, or a duly certified transcript of the record, may be read in evidence in all the courts within this state without further proof.

§ 83. Time limit for probate and administration. In addition to the limitations of time provided in section 73 hereof, no written will shall be admitted to probate and no administration shall be granted unless application is made to the court for the same within five years from the death of the decedent; and no oral will shall be admitted to probate except in accordance with the provisions of section 49 hereof.

Comment. The section last referred to is the portion of the Model Execution of Wills Act dealing with oral wills.

The five-year limitation laid down in this section is designed to take care of situations where there has been no probate or grant of administration during the period of five years. It is not intended to modify the restrictions laid down in §§ 73 to 75, except to the extent that it sets an outside limit of five years. This section is intended to prohibit and to render ineffective any grant of letters if the petition is filed after five years. Section 135(d) and this section both have legal effect after the five-year period. By the operation of these sections the heirs may deal with the property as owners after the five-year period.

§ 84. Devolution of estate at death. When a person dies, his real and personal property, except exempt property and homestead interests, passes to the persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it shall be subject to the possession of the personal representative and to the election of the surviving spouse and shall be chargeable with the expenses of administering the estate, the payment of other claims and allowances to the family, except as otherwise provided in this Code.

Comment. See § 124 and comment thereto.

§ 85. No will effectual until probated. Except as provided in sections 86 and 87 hereof, no will shall be effectual for the purpose of proving title to, or the right to the possession of, any real or personal property, disposed of by the will, until it has been admitted to probate.

Comment. Statutes of this general character are common. Some even go so far as to say that no will shall be effectual to pass real or personal estate until it has been admitted to probate. But it is uniformly held that this is a matter of the production of evidence and does not prevent the passing of title at the time of testator's death.

It is not the purpose of this section to preclude the use of an unprobated will to prove a tort or to establish a constructive trust in a proper case. Thus an unprobated will might be introduced in evidence

to secure a remedy for actual fraud or duress. But the mere fact that a will was not presented for probate within the statutory time for contest or for probate, or that its existence was not known within that time, would furnish no basis for imposing a constructive trust in favor of beneficiaries of the unprobated will.

It would seem, moreover, that such indirect remedies as an action for tort or a constructive trust would rarely be needed under this Code, for an after discovered will may be introduced at any time until final distribution. See § 75. Likewise, § 19 is very liberal in permitting the reopening of an order or decree for cause.

DISPENSING WITH ADMINISTRATION

Comment to §§ 86-92. The seven sections which follow are intended to provide three distinct methods by which administration may be dispensed with, in whole or in part, in small estates. (See, also, §§ 229, 235 and 237 in part IV on Guardianship.)

Sections 86 and 87 are intended to cover the small estate in which administration is neither had nor contemplated. It is intended merely to enable the surviving family of a decedent to collect assets of the estate without the necessity of resorting to administration. They are modeled after Cal. Prob. Code Ann. (Deering, 1944) §§ 630, 631 and Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 478, 481. Being limited to estates not exceeding \$1,000, they will for the most part be utilized to collect bank deposits, wage claims, insurance proceeds and the like, and to transfer registered securities and automobiles. They are not intended, however, to preclude the subsequent granting of an administration if the same be desired. Where there is a surviving spouse or minor child, they will ordinarily be entitled to such assets absolutely as exempt property irrespective of the existence of creditors. On the other hand, if the surviving heirs are not so closely related to the decedent, such assets may be subject to administration, and the distributees to whom such assets are paid or delivered will be accountable to a personal representative, if one should be appointed subsequently. A lapse of thirty days is required before this section may be employed, in order to afford creditors an opportunity to demand administration. Of course, the distributees may prevent the initiation of administration by paying creditors who otherwise might insist upon administration.

Sections 88-91 provide a method for the summary distribution of a small estate to the surviving spouse or minor children where the same, exclusive of homestead and exempt property, would otherwise be entirely consumed in the payment of a family allowance. The upper

limit of \$2,500 is suggested as a maximum value of an estate to which these sections should apply. In these estates, also, ordinary creditors would not share and consequently there is no reason why distribution cannot be made immediately. These provisions are not a required, but only an optional, course of procedure. They have the advantage of providing a judicial method of accomplishing their purpose, whereas the procedure contemplated by §§ 86 and 87 is entirely without judicial supervision.

Section 92 differs from the preceding sections in that it applies to estates in which administration has been commenced but which are so small in size that general creditors will not share in their distribution. A summary and early distribution is thus provided.

§ 86. Collection of small estates by distributees upon affidavit. The distributees of an estate shall be entitled thereto without awaiting the appointment of a personal representative or the probate of a will when

- (a) No petition for the appointment of a personal representative is pending or has been granted, and
- (b) Thirty days have elapsed since the death of the decedent, and
- (c) The value of the entire assets of the estate, not including homestead and exempt property, does not exceed [\$1,000], and
- (d) There is furnished to any person owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right, an affidavit showing the existence of the foregoing conditions and the right of the distributees to receive such money or property or to have such evidences transferred.

§ 87. Same; effect of affidavit; release; suit. The person making payment, delivery, transfer or issuance pursuant to the affidavit described in section 86 shall be released to the same extent as if made to a personal representative of the decedent and he shall not be required to see to the application thereof or to inquire into the truth of any statement in the

affidavit, but the distributees to whom payment, delivery, transfer or issuance is made shall be answerable therefor to any person having a prior right and be accountable to any personal representative thereafter appointed. If the person to whom such affidavit is delivered refuses to pay, deliver, transfer, or issue the property as above provided, it may be recovered or compelled in an action brought for such purpose by or on behalf of the distributees entitled thereto, upon proof of the facts required to be stated in the affidavit.

§ 88. Petition for order of no administration. If the value of the entire assets of an estate, not including homestead and exempt property, does not exceed [\$2,500] and does not exceed the amount to which the surviving spouse and minor children of the decedent are entitled as a family allowance, there may be filed by or on behalf of the surviving spouse or minor children a petition in any court of proper venue for administration, or if a petition for the appointment of a personal representative has been filed but not yet granted, then in the court where such petition has been filed, praying the court to make a family allowance and to make an order that no administration shall be necessary. The petition shall state the names of the heirs or devisees, a list of creditors of the estate together with the amounts of the claims so far as the same are known, and a description of all real and personal property belonging to the estate, together with the estimated value thereof according to the best knowledge and information of the petitioner, and the liens and encumbrances thereon, with a prayer that the court make a family allowance and that, if the entire assets of the estate are thereby exhausted, the same be set aside to the surviving spouse, if there be one, otherwise to the minor children.

Comment. This section is similar in substance to Cal. Prob. Code Ann. (Deering, 1944) §§ 640, 642. It is intended to be applicable if there is real as well as personal property, and whether the decedent

died testate or intestate. If there is a will, its probate will not affect the right to pursue the procedure provided in this section. Procedure similar to the above for a judicial dispensing with administration under certain circumstances exists in many states at the present time. See Fla. Stat. Ann. (1941) § 735.02. The procedure for making a family allowance is provided by § 44.

§ 89. Same; hearing and order. Upon the filing of a petition for no administration the court may hear the same forthwith without notice, or at such time and upon such notice as the court may require. Upon the hearing of the petition, if the court finds that the facts contained therein are true and that the expenses of the last illness, funeral charges and expenses of the proceeding have been paid or secured, the court shall make a family allowance and, if the entire assets of the estate are thereby exhausted, shall order that no administration be had in the estate and shall assign to the surviving spouse or, if there be no surviving spouse, then to the minor children the whole of the estate, subject to the liens and encumbrances thereon.

Comment. The above section follows in part Fla. Stat. Ann. (1941) § 735.03 and Cal. Prob. Code Ann. (Deering, 1944) § 645.

§ 90. Same; effect of order. The order that no administration be had on the estate shall, until revoked, constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right belonging to the estate and to persons purchasing or otherwise dealing with the estate, for payment or transfer to the persons described in the order as entitled to receive the estate without administration.

Comment. This section follows in general the form of Fla. Stat. Ann. (1941) § 735.04.

§ 91. Same; proceedings to revoke order. At any time within one year after the making of an order of no administra-

tion, any person interested in the estate may file a petition to revoke the same alleging that other property has been discovered, or that property belonging to the estate was not included in the petition for no administration, or that the property described in the petition was improperly valued, and that if said property were added, included or properly valued, as the case may be, the total value of the property would exceed that necessary to justify the court in ordering no administration. Upon proof of any of such grounds, the court shall revoke the order of no administration; but the order of no administration shall not be revoked on these grounds after the expiration of one year from the date of the order. In case of any contest as to the value of any property, the court may appoint two appraisers to appraise the same in accordance with section 120 of this Code.

Comment. This section contemplates a direct attack upon the order of no administration in the probate court. It is in addition to the remedy by appeal. But it embodies reasons some of which would not be available by appeal; and, because the petition may have been granted without notice, a longer time is allowed.

If an order of no administration is revoked, the court may then grant administration upon the filing of a petition therefor.

§ 92. Summary proceedings for small estates after personal representative appointed. Whenever, after the inventory and appraisal has been filed by a personal representative, it is established that the estate of a decedent, exclusive of the homestead and exempt property and family allowances to the surviving spouse and minor children, does not exceed an amount sufficient to pay the claims of classes 1 to 6 inclusive, the personal representative upon order of the court shall pay the same in the order provided and thereafter present his account with an application for the settlement and allowance thereof. Thereupon the court, with or without notice, may adjust, correct, settle, allow or disallow such ac-

count and, if the account is settled and allowed, decree final distribution, discharge the personal representative and close the administration.

Comment. The above section follows the general plan of Kan. Gen. Stat. (Supp. 1943) § 59-1507 and Minn. Stat. (1941) § 525.51. It contemplates a minimum of administration. It differs from the preceding sections which actually dispense with administration, in that it contemplates some administration by a personal representative under the supervision of the court until it appears that further administration is unnecessary. See § 142 for the classification of claims.

ADJUDICATED COMPROMISE OF CONTROVERSIES

§ 93. Agreement to compromise controversies authorized. The compromise of any contest or controversy as to

- (a) Admission to probate of any instrument propounded as the last will of any decedent,
- (b) The construction, validity or effect of any such instrument,
- (c) The rights or interests in the estate of the decedent of any person, whether claiming under a will or as heir,
- (d) The rights or interests of any beneficiary of any testamentary trust, or
- (e) The administration of the estate of any decedent or of any testamentary trust,

whether or not there is or may be any person interested who is a minor or otherwise without legal capacity to act in person or whose present existence or whereabouts cannot be ascertained, or whether or not there is any inalienable estate or future contingent interest which may be affected by such compromise, shall, if made in accordance with the provisions of this Code, be lawful and binding upon all the parties thereto, whether born or unborn, ascertained or unascertained, including such as are represented by trustees, guardians of estates and guardians ad litem; but no such compromise shall in any way impair the rights of creditors or of taxing authorities.

Comment. It would seem that, even in the absence of legislation, interested persons who are sui juris should be able to enter into a compromise agreement as to the validity or effect of a will or as to other controverted matters with respect to an estate, which would be fully binding upon them. In view of the decision in *Will of Dardis*, 135 Wis. 457, 115 N.W. 332 (1908), and other similar cases, however, legislation is desirable. Moreover, it frequently happens that some of the interested parties are incompetent, unascertained or even unborn; in which case legislation is necessary in order that such parties may be bound by the compromise agreements of their guardians or guardians ad litem. This and the two sections which follow are designed to make possible an adjudicated compromise even in situations where interested parties are unborn or unascertained. Legislation of this kind is believed to be desirable in avoiding the expense of litigation and in clearing titles. These sections are modeled in substance after the Michigan compromise statute, Mich. Stat. Ann. (1943) §§ 27.3178(115) to 27.3178(119). For other statutes of this type, see Mass. Ann. Laws (1932) c. 204, §§ 14-18; N. Y. Dec. Est. Law, § 19.

§ 94. Compromise agreement to be executed and delivered to the court; appointment of guardian ad litem.

(a) Execution of compromise agreement by competent persons. The terms of such compromise shall be set forth in an agreement in writing which shall be executed by all competent persons having interests or claims which will or may be affected by such compromise, except those who may be living but whose present existence or whereabouts is unknown and cannot after diligent search be ascertained.

(b) Submission to court for execution by fiduciaries. Any interested person may then submit the agreement to the court for its approval and for the purpose of directing the execution thereof by the personal representative of the estate, by the trustees of every testamentary trust which will be affected by the compromise, and by the guardians of the estates of minors and other incompetents and of unborn and unascertained persons and of persons whose present existence or whereabouts is unknown and cannot after diligent search be ascertained, who might be affected by the compromise.

(c) **Appointment of guardian ad litem.** If there shall be any person who, if living, has an interest which may be affected by such compromise but whose present existence or whereabouts cannot after diligent search be ascertained, or who is a minor or otherwise incompetent and has no guardian of his estate, or if there is any future contingent interest which might be taken by any person not then in being and which might be affected by the compromise, the court shall appoint a guardian ad litem to represent such person.

§ 95. Order approving agreement and directing execution by fiduciaries. Upon due notice, in the manner directed by the court, to all interested persons in being, or to their guardians, and to the guardians of all unborn persons who may take contingent interests by the compromise, and to the personal representative of the estate and to all trustees of testamentary trusts which would be affected by the compromise, the court shall, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries is just and reasonable, make an order approving the agreement and directing the fiduciaries and guardians ad litem to execute such agreement. Upon the making of such order and the execution of the agreement, all further disposition of the estate shall be in accordance with the terms of the agreement.

PERSONAL REPRESENTATIVES

§ 96. Persons entitled to domiciliary letters.

(a) **Order of persons entitled.** Domiciliary letters testamentary or domiciliary letters of general administration may be granted to one or more of the persons hereinafter mentioned, natural or corporate, who are not disqualified, in the following order:

- (1) To the executor or executors designated in the will;

- (2) To the surviving spouse or next of kin, or both, or to some person or persons nominated by them or any of them, as the court may, in its discretion, determine;
- (3) If there are no executors nor a surviving spouse nor any next of kin, or if none of such persons files a petition for letters within thirty days after the death of the decedent, then to any other qualified person.

(b) Who are disqualified. No person is qualified to serve as a domiciliary personal representative who is

- (1) Under twenty-one years of age;
- (2) Of unsound mind;
- (3) A convicted felon, either under the laws of the United States or of any state or territory of the United States;
- (4) A non-resident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court;
- (5) A corporation not authorized to act as a fiduciary in this state;
- (6) A person whom the court finds unsuitable.

Comment. Statutes determining who are entitled to appointment as personal representatives are found in all states. While they differ widely, they seem in general to be based on two principles. Either the administrator is selected because of his interest in the estate or he is selected because of his close relationship to the decedent. Of course, the decedent's choice, if he names an executor, is preferred. In some states, such as Michigan, the idea of requiring an interest in the estate for appointment as an administrator is carried very far. An assignee of the surviving spouse or next of kin is given a priority. Mich. Stat. Ann. (1943) § 27.3178(122). As a corollary, the surviving spouse or next of kin loses his priority if he assigns his interest. The other basis of choice is relationship to the decedent. Clearly this seems reasonable when applied to a surviving spouse who probably knows

more about the property and business of the decedent than anyone else and who may have helped to accumulate the estate. It also seems reasonable in most cases when applied to heirs or next of kin. Some statutes, such as the Illinois statute, carry this principle even farther and give preference to relatives who are not next of kin but who would be next of kin if nearer relatives were dead. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 248. Many statutes give the preferred person also a right to nominate someone else, e. g., Illinois statute cited *supra*. Sometimes this right to nominate is given only to the surviving spouse. In other instances it is given to the next of kin also. In drafting this section, it was believed that the person who had a preference should also have the right to nominate in all cases except in the case of an executor.

In a number of states a preference is given to distributees on the ground of pecuniary interest in the estate, e. g., Ky. Rev. Stat. (1944) § 395.040. That seems reasonable in many instances but has not been followed in the proposed section because there are so many cases where it might not work out well. A wealthy testator bequeaths \$100 to a worthy servant, yet the servant should have no preference as administrator; or the testator gives the residue of his estate to a charity in which he is not greatly interested, believing that there will not be a very large residue. This charity would hardly have the interest to become a suitable administrator. If, as some statutes do, a distinction is made between the principal devisee and other devisees, there would be many cases where it could not be decided whether the person was the principal devisee. On the whole, it has seemed best not to give devisees, as such, a preference to appointment. In reviewing the state statutes, attention should be called to particular classes which seem to come in for express disfavor. In a number of states the testator's partner is either excluded or discriminated against. In Michigan, a creditor of the deceased is excluded, Mich. Stat. Ann. (1943) § 27.3178(122), though in many other states a creditor has a preference, e. g., Colo. Stat. (1935) c. 176, § 74. Massachusetts gives a preference not only to next of kin but also to their guardians. Mass. Ann. Laws (1932) c. 193, § 1. Some statutes give a preference to the foreign consul of the country of which the decedent was a citizen, e. g., Ore. Comp. Laws (1940) § 19-210.

No fixed order of preference seems very satisfactory and for that reason the section has been made as flexible as possible, giving the court a wide discretion.

The above section permits non-resident personal representatives. In some jurisdictions the personal representative must always be a resident. In others there is no requirement that the personal repre-

sentative be a resident. Still others, like the section presented herewith, take a middle ground, and permit a non-resident personal representative subject to restrictions. It would seem that it is occasionally desirable to have a non-resident act as personal representative. Numerous situations could be suggested where that would be true. For example, the decedent may have resided near the state line and the bulk of his estate may be in the adjoining state. Or his relatives, or those who knew him best and on whom he relied in business matters, may reside just over the state line. It would be unfortunate to preclude them from qualifying as personal representatives.

§ 97. When letters to be issued. When a duly appointed personal representative has given such bond as may be required and the bond has been approved by the court, letters under the seal of the court shall be issued to him.

§ 98. When personal representative may be removed. When the personal representative becomes mentally incompetent, disqualified, unsuitable or incapable of discharging his trust, has mismanaged the estate, failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be a resident of the state without filing the authorization of an agent to accept service as provided by section 96(b) hereof, then the court may remove him. The court on its own motion may, or on the petition of any person interested in the estate shall, order the representative to appear and show cause why he should not be removed. The removal of a personal representative after letters are duly issued to him does not invalidate his official acts performed prior to removal.

Comment. Modeled after Minn. Stat. (1941) § 525.501.

§ 99. Appointment of successor personal representative. When a personal representative dies, is removed by the court, or resigns and such resignation is accepted by the court, the court may, and if he was the sole or last surviving personal representative and administration is not completed, the court shall, appoint another personal representative in his place.

§ 100. Successor personal representative and administrator with will annexed; rights and powers. When a successor personal representative or an administrator with the will annexed is appointed, he shall have all the rights and powers of his predecessor or of the executor designated in the will, except that he shall not exercise powers given in the will which by its terms are personal to the executor therein designated.

§ 101. Powers of surviving personal representative. Every power exercisable by joint personal representatives may be exercised by the survivor of them when one is dead or by the other when one appointment is terminated by order of the court, unless the power is given in the will and its terms otherwise provide as to the exercise of such power.

§ 102. What powers of personal representatives joint and what several. Where there are two or more personal representatives, the following powers can be exercised only by all of them:

- (a) To institute suit on behalf of the estate;
- (b) To employ an attorney;
- (c) To carry on the business of the deceased;
- (d) To vote corporate shares of the estate;
- (e) To exercise those powers given by the will which, by the terms of the will, are to be exercised only by all of the personal representatives, or by all the survivors of them.

All other powers can be exercised by any one of the personal representatives, unless the will otherwise provides.

§ 103. Compensation. If a testator by will makes provision for the compensation of his executor or administrator, that shall be taken as his full compensation unless he files in the court a written instrument renouncing all claim for the compensation provided by the will before qualifying as per-

sonal representative. The personal representative, when no compensation is provided in the will, or when he renounces all claim to the compensation provided in the will, shall be allowed such compensation for his services as the court shall deem just and reasonable. Additional compensation may be allowed for his services as attorney and for other services not required of a personal representative. An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable. Such compensation may be allowed at the final settlement; but at any time during administration a personal representative or his attorney may apply to the court for an allowance upon the compensation of the personal representative and upon attorney's fees. If the court finds that the personal representative has failed to discharge his duties as such in any respect, it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

Comment. This section follows a number of statutes in leaving the fixing of fees to the discretion of the court. See, for example, Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 490 and 491. In view of the wide variety of situations which may determine the amount of fees, a hard and fast rule expressed in the statute seems undesirable. If it be thought helpful to have some sort of standard percentage basis to guide the court in ordinary cases, the local court may establish this by a rule of its own.

The idea of the executor renouncing his fee and accepting the fee fixed by the court is embodied in a number of statutes in various states. See 38 Mich. L. Rev. 381 (1940). While at first blush it may appear to go too far in overriding testamentary intent, it is believed that it is justified. Primarily, this is based upon the propositions that the court, for the benefit of all persons interested in the estate, exercises a sound discretion to appoint a suitable personal representative, and that the estate will be administered in a more competent manner if an adequate fee is paid. If we were to say that the testator should be able to set a low fee and compel his executor to accept that amount or renounce the office, then unsatisfactory results might follow. This executor might be the most highly qualified to administer the estate,

and an inferior administrator would be appointed who would receive a larger fee than the person named in the will. While this might not often happen, it is entirely possible that the testator might name a series of executors to be appointed according to a given order of preference, none of them to receive more than the low fee named in the will. By this means he could name all the competent persons in the community and thus preclude adequate payment for the services of administering his estate by any well qualified person. Yet it is clear that the law should not allow a testator to deny to the administrator all compensation beyond the amount he should name. If he could do that he could provide in his will that no fee whatever should be paid to any person for administering his estate. And it would be but one step further for him to provide that his estate should not be administered at all. It is believed that the only place to draw the line is at the point where this section draws it.

§ 104. Allowance for defending will. When any person designated as executor in a will, or the administrator with the will annexed, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney's fees in such proceedings.

Comment. If a personal representative prosecutes or defends in proceedings to construe a will, he can recover expenses and attorney's fees without a statute such as this. This section is necessary only because, if probate is denied, it might be claimed that a personal representative named in it or defending it is not entitled to expenses and attorney's fees.

§ 105. Special administrators. For good cause shown a special administrator may be appointed pending the appointment of an executor or a general administrator or after the appointment of an executor or a general administrator without removing the executor or general administrator. A special administrator may be appointed without notice or upon such notice as the court may direct. The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts, as stated in the order of appoint-

ment. The special administrator shall make such reports as the court shall direct, and shall account to the court upon the termination of his authority. Otherwise, and except as the provisions of this Code by terms apply to general personal representatives, and except as ordered by the court, the law and procedure relating to personal representatives in this Code shall apply to special administrators. The order appointing a special administrator shall not be appealable.

BOND OF PERSONAL REPRESENTATIVE

§ 106. Personal representative to give bond. Except as provided in section 107, every personal representative shall, before entering upon the duties of his office and within such time as the court directs, execute and file a bond, procured at the expense of the estate, with sufficient surety or sureties in such amount as the court finds necessary for the protection of interested parties, conditioned upon the faithful discharge of all duties of his trust according to law, including his duty to account as provided in section 172. In the absence of special circumstances, the court shall fix the bond in the amount of the value of any part of the estate which it can determine from examination that the personal representative might easily convert during the period of administration plus the value of the gross annual income of the estate.

Comment. This section follows a number of jurisdictions in giving the court a discretion with respect to the amount of the bond. In other jurisdictions the amount of the bond is determined by a more or less rigid rule. Thus, it is common to require a bond in double the appraised value of the personal estate plus double the probable income of the real estate. However, it is believed to be impossible to determine fairly in all cases the amount of the bond by a fixed rule. The character of the assets, the fact that the personal representative is the principal distributee and that there are no debts, the fact that other assets may soon be received, and many other factors may well enter into the discretion of the court in determining the amount of the bond. However, the determination of the amount should not be capricious;

and in the absence of special circumstances, the rule laid down in the last sentence of this section should be followed. Since, under § 115 the amount of the bond may be increased if a sale takes place, it may be desirable to take the probability of such sale into consideration in fixing the original bond if it is reasonably certain that the sale will take place and its approximate terms can be anticipated.

This and the succeeding sections on bonds of personal representatives apply to special administrators, as well as general administrators and executors. See § 3(u). Under this section, the bond of a special administrator may be fixed at a nominal amount, since the very circumstances calling for the appointment of a special administrator may also constitute the "special circumstances" referred to in this section.

§ 107. When bond not required.

(a) **Provisions of will.** When, by the terms of the will, the testator expresses a wish that no bond shall be required of the executor, no bond shall be required unless the court, for good cause, finds it proper to require it; but the court, for good cause, may at any subsequent time require a bond to be given.

(b) **Deposit of collateral by personal representative.** A personal representative may at any time turn over to and deposit with the clerk of the court cash or collateral in an amount and nature satisfactory to the court in lieu of all or a part of the amount of his bond. The clerk shall be liable for the safekeeping thereof and shall pay out or deliver the same only on order of the court.

(c) **Deposit of personal assets of estate.** Personal assets of the estate may be deposited with a domestic banking or trust company upon such terms as may be prescribed by order of the court. The amount of the bond of the personal representative may be reduced in proportion to the value of the assets so deposited; or the court may, if the assets so deposited be deemed sufficient, accept the deposit in lieu of requiring a bond of the personal representative.

(d) **Corporate fiduciary as personal representative.** If the personal representative is a trust company or bank existing or doing business under the laws of this state, the deposit of

cash or collateral with the state treasurer required by such laws may, if satisfactory to the court, be accepted in lieu of requiring a bond.

Comment. Even though a will provides that the executor need not give bond, the court is empowered to require it for good cause. Thus, if there is a testamentary power of sale, the court should, in case of doubt, require a bond for the protection of creditors. See § 115 of this Code.

It should be pointed out that subsection (d) must be adapted to the local trust company and banking laws. A number of states do not have any such provisions requiring the deposit of cash or collateral with the state treasurer. In those states it will be necessary to omit this subsection. Moreover, if the deposit of cash or collateral with the state treasurer is not likely to be adequate, then subsection (d) should not be enacted.

§ 108. Agreement between personal representative and surety as to deposit of assets. It shall be lawful for the personal representative to agree with his surety for the deposit of any or all moneys and other assets of the estate with a bank, safe deposit or trust company, authorized by law to do business as such, or other depository approved by the court, if such deposit is otherwise proper, in such manner as to prevent the withdrawal of such moneys or other assets without the written consent of the surety, or on order of the court made on such notice to the surety as the court may direct.

Comment. The provision embodied in this section is similar to statutes found in many states. See Cal. Gen. Laws (Deering, 1944), Act 8317. While some courts have held that such an agreement as to withdrawals is valid without any statute, there is authority to the contrary; and it is believed that this statute should be included in order to remove any doubt about the matter.

§ 109. Obligees of bond; joint and several liability. The bond of the personal representative shall run to [the State of to the use of] all persons interested in the estate and shall be for the security and benefit of such persons. The

sureties shall be jointly and severally liable with the personal representative and with each other.

§ 110. Bonds of joint personal representatives. When two or more persons are appointed personal representatives of the same estate and are required by the provisions of this Code to give a bond, the court may require either a separate bond from each or one bond from all of them. No personal representative shall be deemed a surety for another personal representative unless the terms of the bond so provide.

§ 111. Affidavit of personal sureties. Each personal surety shall execute and file with the court an affidavit that he owns property subject to execution, of a value over and above his liabilities, equal to the amount of the bond, and shall include in such affidavit the total amount of his obligations as surety on other official or statutory bonds. If the amount of his bond exceeds \$1,000, the affidavit shall also state

- (a) An adequate description of the real property within this state offered by him as security, which identifies it sufficiently to establish the lien of the bond thereon as hereinafter provided;
- (b) The total amount of the liens, unpaid taxes and other encumbrances against each property offered;
- (c) The assessed value of such property offered, its market value and the value of the equity over and above all encumbrances, liens and unpaid taxes;
- (d) That the equity of such real property offered is equal to the amount of the bond.

Comment. As to the provisions for a lien on real property of the surety, see comment to § 113 hereof.

§ 112. Approval of bond by judge. No bond of a personal representative shall be deemed sufficient unless it shall have been examined and approved by the judge, or in his ab-

sence by the clerk, and the approval endorsed thereon in writing. Before giving approval the judge or clerk may require evidence as to the value and character of the assets of personal sureties, including an abstract, certificate or other satisfactory evidence of title of every tract of real property which is offered as security. In the event that the bond is not approved, the personal representative shall, within such time as the judge or in his absence the clerk may direct, secure a bond with satisfactory surety or sureties.

§ 113. Bond as lien on real property of personal surety; recording of lien. Upon the approval and recording of the bond of a personal surety, when the amount of such bond exceeds \$1,000, a lien on the real property of the surety in this state, offered in the affidavit of the surety, shall arise as security for the performance of the obligation of the bond. The clerk of the court shall, before letters are issued to the personal representative, cause to be recorded in the office of the [register of deeds] of each county in which may be located any real property as set forth in the affidavit of the surety, a statement signed by the clerk, giving a sufficient description of the land, the name of the principal and sureties, the amount of the bond, and the name of the estate and the court in which the bond is given. The [register of deeds] shall record such statement, either in the book of liens or in a suitable book provided for liens on real property of sureties. All such recorded statements shall be duly indexed in such manner that the existence and character of the liens may conveniently be determined.

Comment. The effect of this section, together with provisions in §§ 111, 112, 116 and 117, is to require each personal surety, on bonds fixed in an amount in excess of \$1,000, to give a lien on one or more tracts of his own real estate within the state as security for the performance of the obligation of the bond. The advantages of such a statute are obvious. If the title of the prospective bondsman to real estate is investigated, and if the bond becomes a lien on such real estate when it is approved by the court, the danger of loss from financial irresponsibility

bility of the bondsman is largely eliminated. Certainly in large metropolitan areas where "straw" bondsmen are common, strong arguments can be made for the adoption of such legislation. On the other hand, the probable result of such a statute is that corporate bondsmen would be secured in most cases, and the personal bondsman who acts as such without charging a fee would be relatively uncommon. In rural areas the use of personal bondsmen is likely to be more satisfactory, and in states having no cities of any considerable size it may be thought undesirable to adopt this feature of the Code. For a statute which adopts the principle of requiring a specific lien on real estate of the personal bondsman, see N. Y. Civ. Prac. Act, § 150-a.

If it is deemed best not to require a specific lien on the real estate of the personal bondsman, the Code can be enacted with the following changes: Omit all except the first sentence of § 111. In § 112, omit the following phrase at the end of the second sentence, "including an abstract, certificate or other satisfactory evidence of title of every tract of real property which is offered as security." Omit all of § 113. In § 116 omit subsection (b). Omit all of § 117.

§ 114. Letters deemed revoked on failure to give bond.

If at any time a personal representative fails to give a bond as required by the court, within the time fixed by the court, some other person shall be appointed in his stead. If letters have been issued, they shall be revoked.

§ 115. Court may increase or decrease bond. The court may at any time increase or decrease the amount of the bond of the personal representative when good cause therefor appears. In the absence of special circumstances, the court shall increase the bond on a sale of real property, or of personal property which could not easily be converted.

§ 116. Release of sureties before estate fully administered.

(a) **Release for cause.** For good cause, the court may, before the estate is fully administered, order the release of the sureties of the personal representative, and require the personal representative to furnish a new bond.

(b) Release of personal surety who has given lien on real property. If a personal surety who has given a lien on specific real property as security applies to the court to have the lien released, the court shall order the release requested, if sufficient other real property of the surety is substituted on the same terms and conditions as required for the lien to be discharged. If such personal surety who requests the release of the lien does not offer a lien on other real property, the court shall order the personal representative to offer other security within a reasonable time to be fixed in the order, and upon the approval of such new security, the court shall order the release of such personal surety.

(c) Extent of liability of original and new sureties. The original sureties shall be liable for all breaches of the obligation of the bond up to the time of filing of the new bond and approval thereof by the court, but not for acts and omissions of the personal representative thereafter. The new bond shall bind the sureties thereon with respect to acts and omissions of the personal representative from the time when the sureties on the original bond are no longer liable therefor or from such prior time as the court directs.

Comment. In some states a surety may be released at any time on his request, without a showing of cause. N. Y. Surr. Ct. Act, § 109. In other states a showing is necessary. Ohio Gen. Code (Page, 1937) §§ 10506-26, 10506-27. As far as the corporate surety is concerned, it is felt that it should not be allowed to resign at the very moment when it is needed. Therefore under the provisions of this section such a surety may be released only when there is good cause. The same reasoning applies to the personal surety, with one exception. If the personal surety who has given a lien on land wishes to dispose of the land it may be desirable to discharge the lien. Subsection (b) provides for this situation, requiring the discharge of the lien upon the request of the surety.

§ 117. Recording of release of lien. The lien on the real property of a personal surety shall be cancelled of record by

the [register of deeds] upon filing with him a certified copy of the order duly discharging the surety or releasing the lien.

Comment. See comment to § 113.

§ 118. Suit on bond.

(a) **Execution of bond deemed an appearance.** The execution of the bond of a personal representative shall be deemed an appearance by the surety in the proceeding for the administration of the estate including all hearings with respect to the bond.

(b) **Summary enforcement in proceeding for administration.** Subject to the provisions of subsection (c) hereof, the court may, on breach of the obligation of the bond of the personal representative, after notice to the obligors in the bond and to such other persons as the court directs, summarily determine the damages as a part of the proceeding for the administration of the estate, and by appropriate process enforce the collection thereof from those liable on the bond. Such determination and enforcement may be made by the court upon its own motion or upon application of a successor personal representative, or of any other personal representative, or of any other interested person. The court may hear the application at the time of settling the accounts of the defaulting personal representative or at such other time as the court may direct. Damages shall be assessed on behalf of all interested persons and may be paid over to the successor or other non-defaulting personal representative and distributed as other assets held by the personal representative in his official capacity.

(c) **Enforcement by separate suit.** If the estate is already distributed, or if, for any reason, the procedure to recover on the bond provided in subsection (b) hereof is inadequate, any interested person may bring a separate suit in a court of competent jurisdiction on his own behalf for damages suffered by him by reason of the default of the personal representative.

(d) **Bond not void upon first recovery.** The bond of the personal representative shall not be void upon the first recovery, but may be proceeded upon from time to time until the whole penalty is exhausted.

(e) **Denial of liability by surety; intervention.** If the court has already determined the liability of the personal representative, the sureties shall not be permitted thereafter to deny such liability in any action or hearing to determine their liability; but the surety may intervene in any hearing to determine the liability of the personal representative.

Comment. Subsection (b) providing for summary enforcement of the bond is suggested by the provision on bonds in the Federal Bankruptcy Act. Fed. Code Ann., t. 11, § 78 n. As there is a provision for separate suit, under the Federal Act, a similar provision is made in this section of the Probate Code. It is believed that separate suits would rarely be brought, but that occasionally it would be impracticable to bring a summary action as a part of the probate proceeding.

§ 119. Limitation of action on bond. Proceedings upon the bond of a personal representative shall not be brought subsequent to two years after his discharge.

Comment. This section is modeled after the section of the Federal Bankruptcy Act limiting proceedings on receivers' or trustees' bonds. Fed. Code Ann., t. 11, § 78 m.

INVENTORY

§ 120. Inventory and appraisement.

(a) **Requirements as to inventory.** Within two months after his appointment, unless a longer time shall be granted by the court, every personal representative shall make and return a verified inventory and appraisement in one written instrument, of all the property of the decedent which shall come to his possession or knowledge, including a statement of all encumbrances, liens and other charges on any item. Such property shall be classified therein as follows:

- (1) Real property, with plat or survey description, and if a homestead, designated as such;
- (2) Furniture, household goods, and wearing apparel;
- (3) Corporation stocks described by certificate numbers;
- (4) Mortgages, bonds, notes and other written evidences of debt, described by name of debtor, recording data, and other identification;
- (5) Bank accounts, insurance policies and money;
- (6) All other personal property accurately identified, including the decedent's proportionate share in any partnership, but no inventory of the partnership property shall be required.

(b) Requirements as to appraisal. At the time administration is granted, the court shall appoint two suitable, disinterested persons, as appraisers, to whom the personal representative shall exhibit the inventory. The appraisers shall determine and state in figures opposite each item contained in the inventory the fair net value thereof, as of the date of decedent's death, after deducting the encumbrances, liens and charges thereon, and forthwith deliver such inventory and appraisal, certified by them under oath, to the personal representative who shall file it with the court. The appraisers shall be allowed such reasonable fees, necessary disbursements and expenses as may be fixed by the court, which shall be paid by the personal representative as expenses of administration.

(c) Dispensing with appraisers in certain cases. If the inventory shows that the estate consists solely of personal assets of definitely liquidated values, or of property of negligible value, the court may in its discretion accept the verified appraisal of the personal representative in lieu of appraisal by appraisers; and in such case the court need not appoint appraisers, or may revoke their appointment if already made.

Comment. The purpose of an inventory and appraisal is to make a record of the property belonging to the estate, to indicate its

presumptive value and to furnish the basis upon which the personal representative makes his accounts and for which he is chargeable. It also indicates to creditors and other persons interested in the estate the nature and extent of the property.

The above section is taken largely from Minn. Stat. (1941) §§ 525.33 and 525.331 and Kan. Gen. Stat. (Supp. 1943) §§ 59-1201, 59-1202. The idea of the inventory and appraisal being one instrument is implicit in the Minnesota and Kansas statutes. A separate statement to this effect is found in Mo. Rev. Stat. Ann. (1942) § 58.

Provisions for the time of filing the inventory and appraisal vary from one to three months. The earlier filing seems preferable. However, most of the states providing for the shorter period are those in which a notice (up to one month) precedes the probate of the will and grant of letters. This ordinarily affords additional time to the interested persons to ascertain the nature and extent of the property belonging to the estate. Under this Code, administration may be granted without any notice. Hence, a two-month period was thought to be necessary but ample to make and return the inventory and appraisal.

A few statutes provide for a complete inventory of any partnership property to be included in the inventory of the individual decedent's estate. In view of the special nature of partnership property and of its primary liability for the payment of partnership debts, it was thought better not to require such an inventory. Hence, an appraisal of the decedent's proportionate interest only is provided in the above section. In general as to the administration of partnership assets, see the last paragraph of the Introduction to this Code.

The Kansas statute mentioned above provides for a separate listing of homestead and exempt property. Whether such property is homestead or exempt property would seem to require judicial determination necessitating some action by the court, rather than such a classification by appraisers or the personal representative.

A long statement as to the qualifications of appraisers is deemed unnecessary. They are merely required to be suitable and disinterested. Also, an oath by the appraisers before entering upon their duties is believed unnecessary. Their certificate of the appraisal under oath seems sufficient. As in the case of compensation for personal representatives, a reasonable compensation for the appraisers is to be determined by the court.

Where the property belonging to the estate is located in counties other than where administration is taken out some statutes provide that the court, or the judge of the probate court of such other county,

may appoint residents of such other county as appraisers for the property located therein. See Cal. Prob. Code Ann. (Deering, 1944) § 607. Other statutes contemplate the appraisal of all property wherever located by the same appraisers, and such is the effect of § 120(b) hereof.

A few statutes provide for a listing of claims against the estate along with the inventory. This serves to indicate the net worth of the estate, but it cannot be more than guess work by the personal representatives in many cases, since a much longer time is given to creditors to establish their claims. No such provision is included in the above section.

Tex. Civ. Stat. Ann. (Vernon, 1935) art. 3413 provides for the approval or disapproval of the inventory and appraisal. Such action would seem to have no particular significance in case a later question arises as to the accuracy or completeness of the inventory. See §§ 121 and 123 hereof.

A number of statutes expressly provide for citation, punishment or removal of the personal representative upon failure to make and file an inventory and appraisal or for making an imperfect one. Such a special provision seems unnecessary. The terms of § 98, hereof, would permit removal on this ground.

Statutes in a few states, notably those having the community property system, provide for a separate statement of all property held by husband and wife together. In view of the tendency to subject property held by the entirety or in joint tenancy to inheritance taxes, a provision requiring a separate statement of any property held in joint tenancy, by the entirety or by the community might be added in certain states.

§ 121. Supplementary inventory and appraisalment.

Whenever any property not mentioned in the inventory comes to the knowledge of a personal representative, he shall either make a supplemental inventory thereof and cause such property to be appraised, such supplemental inventory and appraisalment to be returned within thirty days after the discovery thereof, or include the same in his next accounting, unless the court shall order a particular manner of return.

Comment. For similar statutes, see Kan. Gen. Stat. (Supp. 1943) § 59-1203, Cal. Prob. Code Ann. (Deering, 1944) § 611 and Nev. Comp. Laws (Supp. 1941) § 9882.105.

§ 122. Debt of executor. The naming of any person executor in a will shall not operate as a discharge or bequest of

any right of action which the testator had against such executor, but such right of action, if it survives, shall be included among the assets of the decedent in the inventory. If the personal representative is or becomes insolvent, debts owed to the decedent shall not be deemed assets in his hands in determining the liability on his bond.

Comment. The above section follows Kan. Gen. Stat. (Supp. 1943) § 59-1205.

§ 123. Inventory and appraisement as evidence. Inventories and appraisements may be given in evidence in all proceedings, but shall not be conclusive, and other evidence may be introduced to vary the effect thereof.

Comment. This section follows Mo. Rev. Stat. Ann. (1942) § 74. It is similar to statutes found in several states. See Fla. Stat. Ann. (1941) § 733.06.

COLLECTION AND MANAGEMENT OF ASSETS

§ 124. Possession. Every personal representative shall have a right to, and shall take, possession of all the real and personal property of the decedent except the homestead and exempt property of the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees. He shall keep in tenable repair the buildings and fixtures under his control and may protect the same by insurance. He may maintain an action for the possession of the real property or to determine the title to the same.

Comment. Early in the history of American probate courts there was a tendency in the administration of decedents' estates, to treat both real and personal property alike, at least for some purposes. Atkinson, "The Development of the Massachusetts Probate System," 42 Mich. L. Rev. 425, 437 (1943). However, where there is no statute, American courts now generally adhere to the common-law view that title and right to possession of personal property pass to the personal representative, but that both title and right to possession of

real property pass to the heirs or devisees immediately upon the death of decedent. 2 Woerner, Administration (3rd ed., 1923) § 185. The modern English statutory rule is that real property devolves upon the personal representative just as chattel interests formerly devolved upon him. Administration of Estates Act, 15-16 Geo. V, c. 23, § 1 (1925). No American system proceeds on the theory that title to real property passes to the personal representative. Cf. Honsinger v. Stewart, 34 N. D. 513, 159 N. W. 12 (1916). California and a few other states provide that title to both real and personal property passes to the heirs and devisees, subject to the possession of the personal representative. Cal. Prob. Code Ann. (Deering, 1944) § 300. However, the California Probate Code (§ 571) declares that the personal representative *must* take possession of all real and personal property. See also §§ 574, 575, 581, 582 of the California Probate Code. Statutes in other states depart from the common-law rule but only give the personal representative the permissive right to possess the real property. Kan. Gen. Stat. (Supp. 1943) § 59-1401; Minn. Stat. (1941) § 525.34; Nev. Comp. Laws (Supp. 1941) § 9882.106; Wis. Stat. (1943) § 312.04. It seems preferable that the personal representative should have not only the right but also the duty of possession of the entire estate until distributed or delivered over to the heir or devisee upon a showing that it is not needed for the purposes of administration. Section 124 therefore follows the California code in this regard. See also §§ 6, 84, 152, 182 and 183 of the Model Probate Code. See generally Simes and Basye, "Organization of the Probate Court in America," 43 Mich. L. Rev. 113, 123-125 (1944); note, 21 Iowa L. Rev. 793 (1936).

§ 125. Assets for payment of creditors' claims. The real and personal property liable for the payment of debts of a decedent shall include all property transferred by him with intent to defraud his creditors or any of them, or transferred by any other means which is in law void as against his creditors or any of them; and the right to recover such property, so far as necessary for the payment of the debts of the decedent, shall be exclusively in the personal representative, who shall take such steps as may be necessary to recover the same. Such property shall constitute general assets for the payment of all creditors; but no property so transferred shall be taken from

anyone who purchased it for a valuable consideration, in good faith and without knowledge of the fraud.

Comment. In view of the uncertainty and consequent litigation which has arisen concerning the subject matter of this section, it is desirable to have the applicable rule clearly stated. As to conflicting doctrines, see Evans, "The Intermeddler and the Fraudulent Transferee as Executor," 25 Georgetown L. J. 78 (1936), and cases cited in 148 A. L. R. 230. For statutes similar to this section, see Kan. Gen. Stat. (Supp. 1943) § 59-1411 and Vt. Pub. Laws (1933) § 2881. This section is consistent with the Uniform Fraudulent Conveyances Act. It will supplement that act in the jurisdictions where the act has been adopted.

§ 126. Compromise. When it appears for the best interest of the estate, the personal representative may on order of the court effect a fair and reasonable compromise with any debtor or other obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of such encumbered assets from the owner thereof in satisfaction of the indebtedness secured by such lien, if it appears for the best interest of the estate and if the court shall so order. In the absence of prior authorization or subsequent approval of the court, no compromise shall bind the estate.

Comment. This section follows in part Minn. Stat. (1941) § 525.36 and Cal. Prob. Code Ann. (Deering, 1944) § 578. The second sentence is a counterpart of § 147 and that part of § 149 which provides for conveyances by the personal representative of property belonging to the estate to the holder of an encumbrance, in satisfaction thereof, in whole or in part.

§ 127. Conversion.

(a) **When realty treated as personalty.** Unless foreclosure shall have been completed and the redemption period shall have expired prior to the death of a decedent, real prop-

erty mortgages, the interest in the mortgaged premises conveyed thereby and the debt secured thereby or any real property acquired by the personal representative in settlement of a debt or liability shall be deemed personal assets in the hands of his personal representative and be distributed and accounted for as such, but any sale, mortgage, lease or exchange of any such real property shall be made pursuant to sections 150 to 171 inclusive unless otherwise provided in the will.

(b) When personalty treated as realty. In all cases of a sale of real property by a personal representative upon order of the court the surplus of the proceeds of such sale remaining on the final settlement of the account shall be considered as real property and disposed of among the persons and in the same proportions as the real property would have been if it had not been sold.

Comment. Subsection (a) is modeled in part after Ohio Gen. Code (Page, 1937) § 10509-68, Wis. Stat. (1943) § 312.10 and Minn. Stat. (1941) § 525.38. As real and personal property are treated alike in this Code, this section is unnecessary for most purposes and will be infrequently applied. But it may nevertheless be desirable in cases where a will distinguishing between real and personal property must be construed in connection with the administration of an estate. Subsection (b) follows Wis. Stat. (1943) § 316.43.

§ 128. Abandonment of property. When any property is valueless, or is so encumbered, or is in such condition that it is of no benefit to the estate, the court may order the personal representative to abandon it.

Comment. This section follows Minn. Stat. (1941) § 525.401.

§ 129. Property embezzled or converted. If any person embezzles or converts to his own use any of the personal property of a decedent before the appointment of a personal representative, such person shall be liable to the estate for the value of the property so embezzled or converted. No person shall be charged as executor de son tort.

Comment. The term "any person," as used in this section, includes the personal representative. This section follows Minn. Stat. (1941) § 525.392.

§ 130. Disclosure and determination of title to property. Upon the filing of a petition by the personal representative or any other person interested in the estate, alleging that any person has, or is suspected to have, concealed, embezzled, converted or disposed of any real or personal property belonging to the estate of a decedent, or has possession or knowledge of any such property or of any instruments in writing relating to such property, the [] court, upon such notice as it may direct, may order such person to appear before it for disclosure, and may finally adjudicate the rights of the parties before the court with respect to such property. In so far as concerns parties claiming an interest adverse to the estate, such procedure for disclosure or to determine title is an independent proceeding and not within section 62 hereof.

Comment. The term "any person," as used in this section, includes the personal representative. This section is a combination of Minn. Stat. (1941) § 525.85, Kan. Gen. Stat. (Supp. 1943) § 59-2216, and Wis. Stat. (1943) § 312.06. See also Mich. Stat. Ann. (1943) §§ 27.3178(385) and (386), and Ill. Ann. Stat. (Smith-Hurd, Supp. 1943) c. 3, §§ 335 to 339. Legal or equitable remedies are always available to recover property belonging to the estate. Most states, however, provide some summary proceedings in the probate court for making discovery. Some make such proceedings plenary, empowering the court, after a hearing, to determine title and compel the surrender of such property. Some statutes are very elaborate in describing the procedure to be followed. In line with the more recent codes, the details of such procedure are not incorporated in this section, but left to the general sections on procedure. It is contemplated, however, that the proceeding be had in the court exercising probate jurisdiction and adequate notice be given and full opportunity be afforded to present evidence both in support of and in opposition to the petition. If the person mentioned in the petition has knowledge only, but not possession, of the property, the rights of third persons cannot be affected without making them parties.

This section does not allow recovery on a chose in action owed to the decedent. No good reason is perceived why the personal representative should not proceed in the usual way by independent action to recover against the obligor.

It should be noted that, wherever this section is applied to determine the title to real or personal property as between the parties, it resembles an action at law in ejectment or replevin. For that reason it may well be that the person proceeded against could insist on a constitutional right to a jury trial. To that effect are *Tappy v. Kilpatrick*, 337 Ill. 600, 169 N. E. 739 (1930); *Johnson v. Nelson*, 341 Ill. 119, 173 N. E. 77 (1930); *Matter of Wilson*, 252 N. Y. 155, 169 N. E. 122 (1929). If it is desired to make sure that a jury trial could be secured in the matter involved in this section, the following language could be added at the end of § 130: "Any interested person is entitled to a jury trial of the issues of fact in accordance with the provisions of section 18." It should be noted that, even though this addition is not made, a jury trial could be secured on an issue of fact within this section under the provisions of § 18, provided the court determines that it is within the protection of the constitutional provision as to jury trial.

§ 131. Continuation of business. Upon a showing of advantage to the estate, the court may authorize the personal representative to continue any business of the decedent for the benefit of the estate; but if the decedent died testate and his estate is solvent, the order of the court shall be subject to the provisions of the will. The order may be with or without notice. If notice is not given to all interested persons before the order is made, notice of the order shall be given within five days after the order, and any such person not previously notified by publication or otherwise may show cause why the order should be revoked or modified. The order may provide:

- (a) For the conduct of the business solely by the personal representative or jointly with one or more of the decedent's surviving partners, or as a corporation to be formed by the personal representative;
- (b) The extent of the liability of the estate, or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business;

- (c) As to whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole; and
- (d) As to the period of time for which the business may be conducted, and such other conditions, restrictions, regulations and requirements as the court may order.

Comment. Statutes making provision for the conduct of a decedent's business exist in a number of states. See, for example, Kan. Gen. Stat. (Supp. 1943) § 59-1402. In general, see Adelman, "Power to Carry on the Business of a Decedent," 36 Mich. L. Rev. 185 at 213 (1937).

§ 132. Contract to convey or lease land.

(a) **Procedure applicable to cases generally.** When any person legally bound to make a conveyance or lease dies before making the same, the court, with or without notice, may direct the personal representative to make the conveyance or lease to the person entitled thereto. A petition for this purpose may be made by any person claiming to be entitled to such conveyance or lease, or by the personal representative, or by any other person interested in the estate or claiming an interest in the real property or contract, and shall show the description of the land and the facts upon which such claim for conveyance or lease is based. Upon satisfactory proofs the court may order the personal representative to execute and deliver an instrument of conveyance or lease to the person entitled thereto upon performance of the contract.

(b) **Warranties and recording.** If the contract for a conveyance requires the giving of warranties, the deed to be given by the personal representative shall contain the warranties required. Such warranties shall be binding on the estate as though made by the decedent but shall not bind the personal representative personally. A certified copy of the order may be recorded with the deed of conveyance in the

office of the [register of deeds] of the county where the land lies, and shall be prima facie evidence of the due appointment and qualification of the personal representative, the correctness of the proceedings and the authority of the personal representative to make the conveyance.

(c) Conveyance or lease under testamentary power.

If a personal representative has been given power by will to make a conveyance or lease, he may, in lieu of the foregoing procedure, and without order of the court, execute a conveyance or lease to the person entitled thereto upon performance of the contract.

Comment. If the inventory describes the contract binding the decedent to make such a conveyance or lease, this may be sufficient to justify the court in ordering the conveyance without notice under subsection (a).

The last sentence of subsection (b) is highly significant as a method of simplifying land title problems by making the deed and order of court, in and of themselves, adequate and sufficient evidence to be recorded and shown on an abstract of title for the purpose of showing a marketable title. This is intended to eliminate the necessity of showing the appointment of the personal representative, his qualifications, and the numerous other orders in an administration proceeding usually regarded as necessary to meet the requirements of a marketable title.

This section follows partly Minn. Stat. (1941) § 525.69 and partly Wis. Stat. (1943) § 316.38. Its primary purpose is to provide for a simple and expeditious method for conveying the legal title to land under a contract made by the decedent as vendor during his lifetime but which remained uncompleted at the time of his death. The power to do this is essentially equitable and is one which the probate court would not be able to exercise in the absence of statute. It involves the completion of a contract which the decedent himself would have been under obligation to complete had he been alive. The kind and manner of notice to be given is to be provided for by the order of court in setting the petition for hearing.

§ 133. Investment of funds. Subject to his primary duty to preserve the estate for prompt distribution, and to the terms of the will, if any, the personal representative shall, whenever

it is reasonable to do so, invest the funds of the estate and make them productive. Such investments shall be restricted to the kinds of investments permitted to trustees by the laws of this state.

§ 134. Bank deposits. Whenever it is consistent with a proper administration of the estate, the personal representative may deposit, as a fiduciary, the funds of the estate in a bank in this state as a general deposit, either in a checking account or in a savings account.

Comment. See § 108 and comment thereon.

CLAIMS

§ 135. Limitations on filing of claims.

(a) **Statute of nonclaim.** Except as provided in section 136, all claims against a decedent's estate, other than expenses of administration and claims of the United States, but including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court within four months after the date of the first published notice to creditors.

(b) **Statute of limitations.** No claim shall be allowed which was barred by any statute of limitations at the time of decedent's death.

(c) **When statute of nonclaim not affected by statutes of limitation.** No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim shall be filed within four months after the date of the first published notice to creditors.

(d) **Claims barred when no administration commenced.** All claims barrable under the provisions of sub-

section (a) hereof shall, in any event, be barred if administration of the estate is not commenced within five years after the death of the decedent.

(e) **Liens not affected.** Nothing in this section shall affect or prevent any action or proceeding to enforce any mortgage, pledge or other lien upon property of the estate.

Comment. This section covers the usual statute of nonclaim, statutes of limitations, and cases where a conflict may result if both are applied. The language of subsection (a) is traditional except that it includes claims of the state or any subdivision thereof. Subsections (b) and (c) are often found in separate sections but are included here because of their close relationship to one another. Subsection (c) takes care of the case where the statute of limitations expires after the date of the decedent's death but before the statute of nonclaim. For discussion of this last problem see Cook, "Executors and Administrators—Comparison of Nonclaim Statutes and the General Statute of Limitations," 36 Mich. L. Rev. 973 (1938). Compare subsection (d) with § 83, which prohibits the appointment of a personal representative and the probate of a will after five years.

The older view was that the purpose of a nonclaim statute is to protect the personal representative, and that it does not prevent a creditor from asserting his claim against an heir, devisee or legatee who has received assets. This view, however, is abandoned today, at least to the extent that most claims, other than contingent claims, are barred as to distributees as well as to the personal representative by the operation of the nonclaim statute. In the case of the contingent claim, however, the position has been taken that it is unfair to the creditor to compel him to file before he is certain either of the amount or of the existence of his claim. And since the distributee is a donee and not a bona fide purchaser, it is thought that he should be liable whenever the contingent claim becomes absolute. For well drawn statutory provisions which accomplish this objective, see Ohio Gen. Code (Page, 1937 and 1944 Supp.) §§ 10509-112, and 10509-216 to 10509-223. On the other hand, the tendency of modern legislation is definitely to bar contingent claims along with other claims by the operation of the nonclaim statute. For a statute of this kind, see Fla. Stat. Ann. (1941) § 733.16. And, in general, see the discussion in 41 Mich. L. Rev. 920 (1943). If contingent claims are not barred, the distributee can never spend his legacy or his inheritance safely; for he never would know when such a claim would be asserted against him. Moreover, such provisions are in accordance with the policy of the

Federal Bankruptcy Act and with modern legislation for the liquidation of corporations. Death of a debtor is a hazard which all creditors should assume, and if the creditor seeks to avoid it, he can do so by taking security for his claim. The provisions of this section are in accordance with this view, and bar the contingent creditor who does not file. It is true, the court may then make an order to the effect that the claim, if the contingency happens, will constitute a liability of the distributees; and on a distribution under such circumstances, distributees would be reluctant to spend their legacies, but at least they know the character of the claim. Under the older view they have no way of knowing what claims may be asserted against them at some future time. If it is sought to follow the view that contingent claims need not be filed in order to be asserted as a liability against distributees, then it is suggested that the provisions of the Ohio statute be considered as a model. But if this change is made, it should be noted that changes must also be made in §§ 137, 140, 141 and 183.

Subsection (e) includes judgment liens which arose before the death of the decedent. The lien would be treated as a secured claim under § 139. But compare § 145 as to judgments where there is no lien.

§ 136. Commencement of separate action or revivor equivalent to filing of claim. The provisions of section 135 shall not preclude the commencement or continuance of separate actions against the personal representative as such for the debts and other liabilities of the decedent, if commenced or revived within the periods stated in section 135. Any action pending against any person at the time of his death, which survives against the personal representative, shall be considered a claim duly filed against the estate from the time such action is revived. Any action commenced against a personal representative as such after the death of the decedent shall be considered a claim duly filed against the estate from the time such action is commenced. Nothing in this section shall impair the individual liability of the personal representative for his own acts and contracts in the administration of the estate.

Comment. The above section follows Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 359, and Kan. Gen. Stat. (Supp. 1943) § 59-2238.

§ 137. Form and verification of claims.

(a) **General requirements.** No claim shall be allowed against an estate on application of the claimant unless it shall be in writing, describe the nature and the amount thereof, if ascertainable, and be accompanied by the affidavit of the claimant or someone for him that the amount is justly due, or if not yet due, when it will or may become due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant, except as therein stated. If the claim is contingent, the nature of the contingency shall also be stated.

(b) **Requirements when claim founded on written instrument.** If a claim is founded on a written instrument, the original or a copy thereof with all indorsements must be attached to the claim. The original instrument must be exhibited to the personal representative or court, upon demand, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim.

Comment. This section provides the form to be followed in filing every kind of claim. The provision of subsection (b) is found in many forms. The language used in this section follows Cal. Prob. Code Ann. (Deering, 1944) §§ 705 and 706, which was found to be among the best of the many statutes examined. For the meaning of "offsets," see § 144 hereof and comment thereto.

§ 138. Claims not due. Upon proof of a claim which will become due at some future time, the court shall allow it at the present value thereof, and payment may be made as in the case of an absolute claim which has been allowed: provided, if the obligation upon which such claim was founded was entered into before the effective date of this Code, payment may be made as above, if the creditor agrees thereto; otherwise the court may order the personal representative to retain in his hands sufficient funds to satisfy the claim upon maturity; or if the

distributees shall give a bond to be approved by the court for the payment of the creditor's claim in accordance with the terms thereof, the court may order such bond to be given in satisfaction of such claim and the estate may be closed.

Comment. This section is similar to Wis. Stat. (1943) § 313.07 and Kan. Gen. Stat. (Supp. 1943) § 59-2240. The first sentence of this statute expresses the general policy to be achieved by it. It is restricted by its terms to claims which are certain to become due in the future, but does not include contingent claims. As to the contracts entered into before the effective date of this statute, however, it would be unconstitutional. The second sentence is added to provide an alternative method for the payment of such unmatured claims and has the effect of making the section comply with constitutional requirements. Compare § 2(b).

§ 139. Secured claims. When a creditor holds any security for his claim the security shall be described in the claim. If the claim is secured by a mortgage, pledge or other lien which has been recorded, it shall be sufficient to describe the lien by date, and refer to the volume, page and place of recording. The claim shall be allowed in the amount remaining unpaid at the time of its allowance, and the judgment allowing it shall describe the security. Payment of the claim shall be upon the basis of the full amount thereof if the creditor shall surrender his security; otherwise payment shall be upon the basis of one of the following:

- (a) If the creditor shall exhaust his security before receiving payment, then upon the full amount of the claim allowed less the amount realized upon exhausting the security; or
- (b) If the creditor shall not have exhausted or shall not have the right to exhaust his security, then upon the full amount of the claim allowed less the value of the security determined by converting the same into money according to the terms of the agreement pursu-

ant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation, as the court may direct.

Comment. This section follows in part Cal. Prob. Code Ann. (Deering, 1944) § 706, Minn. Stat. (1941) § 525.441 and Kan. Gen. Stat. (Supp. 1943) § 59.1303. The alternative methods for payment follow the principle laid down in the Bankruptcy Act, § 57 h, and the Uniform Act Governing Secured Creditors' Dividends in Liquidation Proceedings. Any state desiring to adopt or having already adopted the Uniform Act should simply provide at this place in its probate code that the allowance and payment of secured claims shall be made pursuant to the provisions of that act.

§ 140. Contingent claims. Contingent claims which cannot be allowed as absolute debts shall, nevertheless, be filed in the court and proved. If allowed as a contingent claim, the order of allowance shall state the nature of the contingency. If such claim shall become absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. In all other cases the court may provide for the payment of contingent claims in any one of the following methods:

- (a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value thereof, according to its probable present worth, and upon approval thereof by the court, it may be allowed and paid in the same manner as an absolute claim.
- (b) The court may order the personal representative to make distribution of the estate but to retain in his hands sufficient funds to pay the claim if and when the same becomes absolute; but for this purpose the estate shall not be kept open longer than two years after distribution of the remainder of the estate has been made; and if such claim has not become absolute

within that time, distribution shall be made to the distributees of the funds so retained, after paying any costs and expenses accruing during such period and such distributees shall be liable to the creditor to the extent of the estate received by them, if such contingent claim thereafter becomes absolute. When distribution is so made to distributees, the court may require such distributees to give bond for the satisfaction of their liability to the contingent creditor.

- (c) The court may order distribution of the estate as though such contingent claim did not exist, but the distributees shall be liable to the creditor to the extent of the estate received by them, if the contingent claim thereafter becomes absolute; and the court may require such distributees to give bond for the performance of their liability to the contingent creditor.

Comment. This section provides alternative methods for the disposition of contingent claims. Many statutes do not provide for contingent claims at all. In many instances those that do provide for them do so incompletely or unsatisfactorily. The above section has some of the provisions of the following statutes: Mich. Stát. Ann. (1943) §§ 27.3178(435), (436), (438), (439), Wis. Stat. (1943) §§ 313.22, 313.25 and the Bankruptcy Act, § 57d.

§ 141. Payment of contingent claims by distributees; contribution. If a contingent claim shall have been filed and allowed against an estate and all the assets of the estate including the fund, if any, set apart for the payment thereof, shall have been distributed, and the claim shall thereafter become absolute, the creditor shall have the right to recover thereon in the [] court against those distributees whose distributive shares have been increased by reason of the fact that the amount of said claim as finally determined was not paid out prior to final distribution, provided an action therefor shall be commenced within six months after the claim becomes ab-

solute. Such distributees shall be jointly and severally liable, but no distributee shall be liable for an amount exceeding the amount of the estate or fund so distributed to him. If more than one distributee is liable to the creditor, he shall make all distributees who can be reached by process parties to the action. By its judgment the court shall determine the amount of the liability of each of the defendants as between themselves, but if any be insolvent or unable to pay his proportion, or beyond the reach of process, the others, to the extent of their respective liabilities, shall nevertheless be liable to the creditor for the whole amount of his debt. If any person liable for the debt fails to pay his just proportion to the creditor, he shall be liable to indemnify all who, by reason of such failure on his part, have paid more than their just proportion of the debt, the indemnity to be recovered in the same action or in separate actions.

Comment. Provisions similar to the above are found in Ohio Gen. Code (Page, 1937 and Supp. 1944) §§ 10509-217 to 10509-223; Mich. Stat. Ann. (1943) §§ 27,3178(446) and 27,3178(447); Wis. Stat. (1943) §§ 287.18 to 287.21, 313.30 to 313.32; Mass. Ann. Laws (1932) c. 197, §§ 29 to 34; N. Y. Dec. Est. Law, §§ 172, 180. The court referred to in the brackets is the court having probate jurisdiction.

§ 142. Classification of claims and allowances. At the time of their allowance, all claims and allowances shall be classified in one of the following classes. If the applicable assets of the estate are insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order:

1. Costs and expenses of administration.
2. Reasonable funeral expenses.
3. Allowance made to the surviving spouse and children of the decedent.
4. All debts and taxes having preference under the laws of the United States.

5. Reasonable and necessary medical expenses of the last sickness of the decedent, including compensation of persons attending him.
6. All debts and taxes having preference under the laws of this state; but no personal representative shall be required to pay any taxes on any property of the decedent unless such taxes are due and payable before possession thereof is delivered by the personal representative pursuant to the provisions of this Code.
7. All other claims allowed.

No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

Comment. The statutes on classification of claims vary somewhat in their method of classification. The above section (1) provides that each claim shall be classified upon its allowance and (2) specifies the order of priority in the payment of expenses of administration, claims and allowances in case the estate is insolvent. The provisions of the last sentence follow Kan. Gen. Stat. (Supp. 1943) § 59-1301. It should be noted that the allowance under 3 is that referred to in § 44 hereof; but it does not include the homestead and exempt property referred to in §§ 42 and 43, since the latter are not liable for the expenses of administration nor for funeral expenses, and do not constitute assets for any purpose except to benefit the family.

It should be pointed out that the first three classes of claims and allowances designated in this section are not debts of the decedent. Under federal statutes as interpreted by the courts, debts due to the United States must be satisfied before other debts due from the deceased. See 31 Fed. Code Ann. §§ 191, 192; *United States v. Weisburn*, (D. C. Pa. 1943) 48 F. Supp. 393; *United States v. Pate*, (D. C. Ark. 1942) 47 F. Supp. 965. For this reason, debts owed to the United States are placed in the fourth class, ahead of all other debts owed by the decedent.

§ 143. Allowance of claims.

(a) **In general.** Except as provided in subsection (b) hereof, no claimant shall be entitled to payment unless his claim shall have been duly filed and allowed by the court.

Each court may provide by rule for the hearing and disposition of claims filed therein, or may set any individual claim or claims for hearing irrespective of rule. Upon the adjudication of any claim the court shall allow it in whole or in part, or disallow it. The order allowing the claim shall have the effect of a judgment and bear interest at the legal rate, unless the claim provides for a higher rate in which case the judgment shall be rendered accordingly. Except in case of the personal representative's own claim, any claim which is approved by him in writing and which has been duly filed, may be allowed by the court at any time without formal hearing.

(b) Expenses of administration. Claims for expenses of administration may be allowed upon application of the claimant or of the personal representative, or may be allowed at any accounting, regardless of whether or not they have been paid by the personal representative.

Comment. The above section follows in part Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 350; Minn. Stat. (1941) § 525.42, and Kan. Gen. Stat. (Supp. 1943) § 59-2237. In a number of jurisdictions, the statutes guarantee a jury trial in a litigation to determine a claim. Indeed, it is entirely possible that it might be held that actions on claims are within constitutional guaranties of trial by jury. See comment to § 18 hereof. If it is desired to insure a jury trial of issues of fact concerning claims, the following sentence should be added to § 143(a): "Either the creditor or the personal representative is entitled to a jury trial of common law issues of fact in accordance with the provisions of § 18." Of course, a jury trial can be secured under the provisions of § 18 without this sentence, if the court is convinced that the situation is within existing constitutional guaranties.

As to claims of the personal representative, see § 146 hereof. As to the individual liability of the personal representative for expenses of administration, see § 136.

§ 144. Offsets to claims. On or before the hearing on any claim, the personal representative shall file a statement of all offsets claimed against the creditor. Upon the hearing of claims and offsets the court shall determine the amount due by

and against the estate and shall render judgment in favor of or against the estate for the net amount. If a judgment is rendered against a claimant for any net amount, execution may issue in the same manner as on judgments in civil cases. An offset may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the claim of the creditor.

Comment. The last sentence of § 144 is substantially the same as Fed. Rules of Civ. Proc., Rule 13(c). The word "offset" has been used here and in § 137 instead of "counterclaim" which appears in the Federal Rules. "Offset" is used in California, in the states which follow its code and in Minnesota and Kansas. As indicated in the above section it includes unliquidated claims and claims for specific property.

§ 145. Execution and levies prohibited. No execution shall issue upon nor shall any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but the provisions of this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

Comment. This section withdraws the estate of a decedent from ordinary execution by creditors and subjects it solely to the orderly process of administration. This may be implied from the other provisions of the Code but is included here to remove all doubts as to the matter and also to specifically authorize such executions as are necessary for the enforcement of liens upon the property of the estate. See Fla. Stat. Ann. (1941) § 733.19.

§ 146. Claims of personal representative. If the personal representative is a creditor of the decedent, he shall file his claim as other persons and the court may appoint any suitable person, whether interested in the estate or not, to represent the estate on the hearing thereof.

Comment. This section follows Cal. Prob. Code Ann. (Deering, 1944) § 703, Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 352, and Mo. Rev. Stat. Ann. (1942) § 202.

§ 147. Compromise of claims. When a claim against the estate has been filed or suit thereon is pending, the creditor and personal representative may, if it appears for the best interests of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated. In the absence of prior authorization or subsequent approval by the court, no compromise shall bind the estate.

Comment. The above section is based on Cal. Prob. Code Ann. (Deering, 1944) § 718.5, Nev. Comp. Laws (Supp. 1941) § 9882.127, and Mich. Stat. Ann. (1943) § 27.3178(429). Compare § 126 of this Code.

§ 148. Payment of claims. Upon the expiration of four months after the date of the first published notice to creditors and the final adjudication of all claims filed against the estate, the personal representative shall proceed to pay the claims allowed against the estate in accordance with the provisions of this Code. If it appears at any time that the estate is or may be insolvent, that there are insufficient funds on hand, or that there is other good and sufficient cause, the personal representative may report that fact to the court and apply for any order that he deems necessary in connection therewith. Prior to the expiration of such period of four months, the personal representative shall pay such of said claims as the court shall order, and the court may require bond or security to be given by the creditor to refund such part of such payment as may be necessary to make payment in accordance with the provisions of this Code, but all payments made by the personal representative without order of court shall be at his own peril.

Comment. Provisions of the above section are taken partly from Ohio Gen. Code (Page, Supp. 1944) § 10509-127 and Wis. Stat. (1943) § 313.13.

§ 149. Encumbered assets. When any assets of the estate are encumbered by mortgage, pledge or other lien, the personal representative may pay such encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or may convey or transfer such assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate and if the court shall so order. The making of such payment shall not increase the share of the distributee entitled to such encumbered assets.

Comment. The above section follows Minn. Stat. (1941) § 525.442 and Kan. Gen. Stat. (Supp. 1943) § 59-1304. See also Wis. Stat. (1943) § 316.47. The following related sections of this Code should be noted: § 126, as to a compromise in lieu of foreclosure of a lien; § 135, as to the inapplicability of the nonclaim statute to liens; § 139, as to marshalling assets in satisfaction of secured claims; § 143, as to a hearing on claims; § 161, as to a sale of mortgaged real property subject to the lien, and § 189, as to the exoneration of encumbered property.

SALES, MORTGAGES, LEASES, EXCHANGES

In General

§ 150. No priority between real and personal property. In determining what property of the estate shall be sold, mortgaged, leased or exchanged for any purpose provided in section 152, there shall be no priority as between real and personal property, except as provided by the will, if any, or by order of the court or by the provisions of section 184.

Comment. Since the historical distinction between real and personal property is becoming less important, and because of the widespread tendency to subject real property to the possession and control of the personal representative during the period of administration to the same extent as personal property, as is done in §§ 84 and 124 of this Code, it is desirable to express this assimilation in connection with sales and similar transactions. The substance of this section is taken from Cal. Prob. Code Ann. (Deering, 1944) § 754.

§ 151. When power given in will. When power to sell, mortgage, lease or exchange property of the estate has been given to any personal representative under the terms of any will, the personal representative may proceed under such power, or may proceed under the provisions of this Code, as he may determine.

Comment. The purpose of this section is to recognize as valid testamentary provisions to sell, mortgage, lease or exchange property, and also to provide that the personal representative may nevertheless proceed under the terms of this Code. The latter course may be deemed by him to be for the best interests of the estate, or the power given to him may be doubtful or inadequate. Statutes of this kind exist in several states. See Ohio Gen. Code (Page, Supp. 1944) § 10510-1; Fla. Stat. Ann. (1941) § 733.22.

§ 152. Transfer under court order; purposes. Any real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order when necessary for any of the following purposes:

- (a) For the payment of claims allowed against the estate;
- (b) For the payment of any allowance made to the surviving spouse and minor children of the decedent;
- (c) For the payment of any legacy given by the will of the decedent;
- (d) For the payment of expenses of administration;
- (e) For the payment of any gift, estate, inheritance or transfer taxes assessed upon the transfer of the estate or due from the decedent or his estate;
- (f) For making distribution of the estate or any part thereof;
- (g) For any other purpose in the best interests of the estate.

Comment. In the absence of provisions in the will, a statute was necessary to authorize a sale in all cases where the decedent had not taken affirmative steps to make the land liable for his debts. Gradually these purposes have been broadened, many of the statutory purposes

appearing in current statutes being that expressed in (g), viz., for any purpose beneficial to the estate. Thus if a small tract of land were to be divided among many heirs or devisees, some of whom were under disabilities, a serious problem of marketability would be presented if it were distributed to them in kind. Under this section it could be sold by the personal representative and the proceeds distributed, thus eliminating a difficult and otherwise expensive problem for the interested persons. The above section was taken in part from N. Y. Surr. Ct. Act, § 234.

It should be noted that a sale cannot be ordered solely on the ground that there is any rule of law to the effect that it is necessary to make distribution in cash. See § 190 hereof.

§ 153. Order to sell, mortgage or lease to be refused if bond given. An order authorizing a personal representative to sell, mortgage or lease real or personal property for the payment of obligations of the estate shall not be granted if any of the persons interested in the estate shall execute and file in the court a bond in such sum and with such sureties as the court may approve, conditioned to pay all obligations of the estate to the extent that the other property of the estate is insufficient therefor, within such time as the court shall direct. An action may be maintained on such bond by the personal representative on behalf of any person interested in the estate who is prejudiced by breach of any obligation of the bond.

Comment. This section follows in substance N. Y. Surr. Ct. Act, § 235, and Wis. Stat. (1943) § 316.13.

§ 154. Terms of sale. In all sales of real or personal property, the court may authorize credit to be given by the personal representative for a period not exceeding one year from the date of his qualification and for an amount not exceeding fifty per cent of the purchase price, the payment of which shall be secured by notes or bonds with approved sureties or by a purchase money mortgage. If credit is authorized, the order shall specify the time of payment, the minimum rate of interest on deferred payments and the manner in which such

payments shall be secured. If the estate is solvent, credit may be extended by the personal representative for a time longer than one year with the written consent of the distributees.

Comment. This section follows in part Minn. Stat. (1941) § 525.642 and Kan. Gen. Stat. (Supp. 1943) §§ 59-2244 and 59-2305.

§ 155. When personal representative may purchase.

Any personal representative may purchase, take a mortgage on, lease or take by exchange, real or personal property belonging to the estate, but such transaction shall always be reported to the court and be subject to confirmation.

Comment. This section modifies the common law rule as to the fiduciary duty owed by a trustee or personal representative. However, in the interests of benefit to the estate, a few statutes have relaxed the common law rule by provisions of this kind. See Fla. Stat. Ann. (1941) § 733.31 and Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 714.1. Since such transactions are to be reported to the court and confirmed, this section is believed to be desirable. Of course, report and confirmation would be required without this section in the case of real property (see § 166), but in the case of personal property it is not generally required. See § 158.

§ 156. Purchase by holder of lien. At any sale of real or personal property upon which there is a mortgage, pledge or other lien, the holder thereof may become the purchaser and may apply the amount of his lien on the purchase price in the following manner. If no claim thereon has been filed or allowed, the court, at the hearing on the report of sale and for confirmation of the sale, may examine into the validity and enforceability of the lien or charge and the amount due thereunder and secured thereby and may authorize the personal representative to accept the receipt of such purchaser for the amount due thereunder and secured thereby as payment pro tanto. If such mortgage, pledge or other lien is a valid claim against the estate and has been allowed, the receipt of the purchaser for the amount due him from the proceeds of the

sale is a payment pro tanto. If the amount for which the property is purchased, whether or not such claim was filed or allowed, is insufficient to defray the expenses and discharge his mortgage, pledge or other lien, the purchaser must pay an amount sufficient to pay the balance of such expenses. Nothing permitted under the terms of this section shall be deemed to be an allowance of a claim based upon such mortgage, pledge or other lien.

Comment. This section is taken in substance from Cal. Prob. Code Ann. (Deering, 1944) § 764. It includes liens on property owned by the estate for the payment of which the estate was not liable, as where the decedent purchased property subject to a mortgage but did not assume its payment, or where a mortgagee could have filed a claim but did not do so.

§ 157. Validity of proceedings. No proceedings for sale, mortgage, lease, exchange or conveyance by a personal representative of property belonging to the estate shall be subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the same had jurisdiction of the estate.

Comment. This section is the modern version of a statute intended to be a substitute for the Massachusetts statute of 1836 based upon the philosophy of that time that probate courts were courts of limited and inferior jurisdiction, but that their sales should be upheld unless defective in certain particulars. The above section is taken from Minn. Stat. (1941) § 525.70 (first adopted in 1935 at which time their statute based upon the early Massachusetts statute was repealed) and is predicated upon the assumption that probate courts now have the same superior status within their sphere as do courts of general jurisdiction. It should be noted that, according to § 62 hereof, failure to give the required notice is not jurisdictional and therefore under § 157 would not invalidate the transfer.

Personal Property

§ 158. Sale, mortgage or lease of personal property. A personal representative may file a petition to sell, mortgage

or lease any personal property belonging to the estate. The petition shall set forth the reasons for the application and describe the property involved. The petition may be heard with or without notice as the court may direct. Notice of the hearing, if required, shall state briefly the nature of the application and shall be given as provided in section 14 hereof. At the hearing and upon proof of the petition the court may order the sale, mortgage or lease of the property described or any part thereof, at such price and upon such terms and conditions as the court shall require. No report or confirmation of such transaction shall be necessary except as required by section 155 or as required by the court; but no sale, mortgage or lease, except as provided in section 159, shall be valid unless prior authorization or subsequent approval of the court is secured.

Comment. If report and confirmation are ordered the procedure in § 166 would be followed.

§ 159. Sales of perishable or depreciable property. Perishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to provide allowance to the surviving spouse and children pending the receipt of other sufficient funds, may be sold without notice, and title shall pass without confirmation; but the personal representative shall be responsible for the actual value of the property unless, after making a report of such sale, and on a proper showing, the court shall approve the sale.

Comment. This section follows Cal. Prob. Code Ann. (Deering, 1944) § 770.

§ 160. Sale, mortgage or lease of real and personal property as a unit. Whenever it is for the best interests of the estate, real and personal property of the estate may be sold, mortgaged or leased as a unit, but the provisions of this Code

with respect to the sale, mortgage or lease of real property shall apply so far as may be.

Real Property

§ 161. Petition to sell, mortgage or lease real property; notice; hearing. A personal representative may file a petition to sell, mortgage or lease any real property belonging to the estate. The petition shall set forth the reasons for the application and describe the property involved. It may apply for different authority as to separate parts of the property; or it may apply in the alternative for authority to sell, mortgage or lease. Upon the filing of the petition, the court shall fix the time and place for the hearing thereof, provided, however, that as to any real property which was last appraised at not more than \$500, the court may, in its discretion, hear the petition without notice. Notice of the hearing shall state briefly the nature of the application and shall be given as provided in section 14 hereof. At the hearing and upon satisfactory proofs, the court may order the sale, mortgage or lease of the property described or any part thereof. When a claim secured by a mortgage on real property is, under the provisions of this Code, payable at the time of distribution of the estate or prior thereto, the court with the consent of the mortgagee may, nevertheless, order the sale of the real property subject to the mortgage, but such consent shall release the estate should a deficiency later appear.

Comment. This section is taken partly from Minn. Stat. (1941) § 525.64 and Kan. Gen. Stat. (Supp. 1943) § 59-2304. As to the matter of increasing the bond of the personal representative on a sale, see § 115 hereof. To the effect that notice is not jurisdictional, see § 62 hereof.

§ 162. Quieting adverse claims. Upon any petition to sell or mortgage real property the court shall have power to investigate and determine all questions of conflicting and con-

troverted title, remove clouds from any title or interest involved, and invest purchasers or mortgagees with a good and indefeasible title to the property sold or mortgaged. When the petition to sell or mortgage seeks such relief notice shall be given as in civil actions of like nature and the court is authorized to issue appropriate process and notices in order to obtain jurisdiction to so proceed against adverse parties.

Comment. See Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 388, subd. (a); Newell v. Montgomery, 129 Ill. 58, 21 N. E. 508 (1889); Schottler v. Quinlan, 263 Ill. 637, 105 N. E. 710 (1914).

§ 163. Order for sale, mortgage or lease of real property. The order shall describe the property to be sold, mortgaged or leased and may designate the sequence in which the several parcels shall be sold, mortgaged or leased. An order for sale shall direct whether the property shall be sold at private sale or public auction, and, if the latter, the place or places of sale. If real property is to be sold it shall direct that the same shall not be sold for less than the appraised value; or if real property is to be leased, it shall direct that the same shall not be leased for less than the appraised rental value. An order of sale shall direct whether the sale shall be for cash or for cash and deferred payments, and the terms on which such deferred payments are to be made. If real property is to be mortgaged, it shall fix the maximum amount of principal, the maximum rate of interest, the earliest and latest date of maturity, and shall direct the purpose for which the proceeds shall be used. An order for sale, mortgage or lease shall remain in force until terminated by the court, but no sale or lease shall be made after one year from the date of the order unless the real property or rental value thereof shall have been reappraised under order of the court within three months preceding the sale or lease.

Comment. The above section follows in part Minn. Stat. (1941) § 525.641 and Kan. Gen. Stat. (Supp. 1943) § 59-2305.

§ 164. Appraisement of real property. Before any personal representative shall sell or lease any real property he shall, unless the court directs that he be permitted to use the appraisal filed with the inventory, have it appraised by two disinterested persons appointed by the court, who are residents of the county in which at least part of it lies. The appraisers shall appraise such real property or its rental value, as the case may be, at its full and fair value, and forthwith deliver the appraisement certified by them under oath to the personal representative.

Comment. Corresponding to § 120 providing for the making of an inventory and appraisement, two appraisers only are provided for. The above section follows in substance Kan. Gen. Stat. (Supp. 1943) § 59-2307.

§ 165. Sales at public auction. In all sales of real property at public auction the personal representative shall give notice thereof particularly describing the property to be sold, and stating the time, terms, and place of sale. The notice shall be published once a week for three consecutive weeks in some newspaper, authorized to publish legal notices, of the county in which the real property is situated, but if no newspaper is published in the county or the real property is appraised at not more than \$500, the personal representative may, in lieu of publication, post a copy of the notice in three public places in the county where the real property or some part thereof lies, at least two weeks before the sale is made. If the notice is published, the date set for the sale shall not be earlier than one day nor later than seven days after the date of the third publication of notice. Proof of publication or posting shall be filed before confirmation of the sale. If the tracts to be sold are contiguous and lie in more than one county, notice may be given and the sale made in either county. The personal representative may adjourn the sale from time to

time, if for the best interests of the estate, but not for longer than three months in all. Every adjournment shall be announced publicly at the time and place fixed for the sale.

Comment. Parts of this section follow Cal. Prob. Code Ann. (Deering, 1944) § 780, Minn. Stat. (1941) § 525.65 and Kan. Gen. Stat. (Supp. 1943) § 59-2308.

§ 166. Report and confirmation. Within ten days after making any sale, mortgage or lease of real property, the personal representative shall make a verified report of his proceedings to the court, with the certificate of appraisement in case special appraisement is required, and with proof of publication or posting in case the sale is made at public auction, which report shall state that he did not directly or indirectly acquire any beneficial interest in the real property, or the lease thereof, except as stated in his report. Any person interested in the estate desiring to object to confirmation may file objections in writing, setting forth the reasons therefor. The court shall examine said report and if satisfied that the sale, mortgage or lease has been at the price and terms most advantageous to the estate and in all respects made in conformity with law and ought to be confirmed, shall confirm the same and order the personal representative to make a deed, mortgage, lease or other proper instruments to the person entitled thereto; but no report shall be confirmed within five days after the filing thereof unless all persons interested in the estate shall in person, or by attorney or guardian, consent in writing to such confirmation, or unless, in the opinion of the court, such delay would not be for the best interests of the estate. Such instrument shall refer to the order of sale, mortgage or lease by its date, and the court by which it was made, and shall transfer to the grantee, mortgagee or lessee all the right, title and interest of the decedent granted by the instrument, discharged from liability for all debts and obligations incident to the admin-

istration of the estate, except encumbrances assumed. If not satisfied that the sale, mortgage or lease has been made in conformity with law or that it is for the best interests of the estate, the court may reject the sale, mortgage or lease or require a re-execution of the order upon such terms and conditions as it may direct.

Comment. This section follows in part N. Y. Surr. Ct. Act, § 240, Mich. Stat. Ann. (1943) § 27.3178(485) and Kan. Gen. Stat. (Supp. 1943) § 59-2309.

§ 167. Execution of conveyance or other instrument by personal representative; recording. Upon the confirmation of any sale, mortgage or lease in accordance with section 166, the personal representative shall execute a conveyance to the grantee or mortgagee or a lease with the lessee according to the order of confirmation. A certified copy of the order may be recorded with the deed or other instrument in the office of the [register of deeds] of the county where the land lies, and shall be prima facie evidence of the due appointment and qualification of the personal representative, the correctness of the proceedings and the authority of the personal representative to execute the instrument.

Comment. This section corresponds to § 132 providing for a conveyance by the personal representative under a land contract executed by the decedent. The purpose of both of these sections is to simplify land title problems by making the deed of the personal representative and the order of the court confirming the transaction adequate and sufficient evidence to be recorded and shown on the abstract of title for the purpose of showing a marketable title, thus eliminating the necessity of showing all the antecedent steps at the probate proceedings.

No attempt is made to set out in this Code the rules with respect to the rights of purchasers where the title of the decedent totally fails. Common law doctrines deal with that situation adequately; and it would be unsatisfactory to state them in statutory form. As to these doctrines, see Atkinson, Wills (1937) 635, 636.

*Miscellaneous Provisions***§ 168. Taxes not to be liens in hands of transferee.**

The lien of the state for inheritance or estate taxes shall not extend to any interest acquired by a purchaser, mortgagee, or lessee through any transfer made by a personal representative under a power contained in a will or under order of the court.

Comment. The purpose of this section is to make it clear that the disposition of property for the payment of taxes shall pass title to such property free from such claims. Otherwise purchasers would not buy and the purpose of authorizing the disposition of property would be thwarted.

This section is modeled after Minn. Stat. (1941) § 525.693 and Wash. Rev. Stat. (Supp. 1940) § 11201. The Washington statute was amended after the decision in *In re Kennedy's Estate*, 188 Wash. 84, 61 P. (2d) 998 (1936).

§ 169. Brokers' fees and title documents. In connection with the sale, mortgage, lease or exchange of property, the court may authorize the personal representative to pay, out of the proceeds realized therefrom or out of the estate, the customary and reasonable auctioneers' and brokers' fees and any necessary expenses for abstracting, title insurance, survey, revenue stamps and other necessary costs and expenses in connection therewith.

Comment. Provisions for payment of a real estate commission are contained in Cal. Prob. Code Ann. (Deering, 1944) § 760, Wis. Stat. (1943) § 316.23, and Kan. Gen. Stat. (Supp. 1943) §§ 59-2312, 59-2313.

§ 170. Platting. When it is for the best interests of the estate in order to dispose of real property, the court, upon application by the personal representative or any other interested person, may authorize the personal representative, either alone or together with other owners, to plat any land belonging to the estate in accordance with the statutes in regard to platting.

Comment. For other statutes authorizing a personal representative to plat real estate see Minn. Stat. (1941) § 525.68 and Wis. Stat. (1943) § 316.10.

§ 171. Exchange of property. Whenever it shall appear upon the petition of the personal representative or of any person interested in the estate to be to the best interests of the estate to exchange any real or personal property of the estate for other property, the court may authorize the exchange upon such terms and conditions as it may prescribe, which may include the payment or receipt of part cash by the personal representative. If personal property of the estate is to be exchanged, the proceedings required for the sale of such property shall apply so far as may be; if real property of the estate is to be exchanged, the procedure for the sale of such property shall apply so far as may be.

Comment. This section is similar in substance to Cal. Prob. Code Ann. (Deering, 1944) § 860. See also N. Y. Surr. Ct. Act, § 250—a authorizing exchanges by testamentary trustees under the direction of the court.

ACCOUNTING

§ 172. Liability of personal representative.

(a) **Property of estate.** Every personal representative shall be liable for and chargeable in his accounts with all of the estate of the decedent which comes into his possession at any time, including all the income therefrom; but he shall not be accountable for any debts due to the decedent or other assets of the estate which remain uncollected without his fault. He shall not be entitled to any profit by the increase, nor be chargeable with loss by the decrease in value or destruction without his fault, of any part of the estate.

(b) **Property not a part of estate.** Every personal representative shall be chargeable in his accounts with property not a part of the estate which comes into his hands at any time and shall be liable to the persons entitled thereto, if

- (1) The property was received, under a duty imposed on him by law in the capacity of personal representative; or

- (2) He has commingled such property with the assets of the estate.

(c) **Breach of duty.** Every personal representative shall be liable and chargeable in his accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or delivering property of the estate he shall have in his hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from his embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of his co-representatives which he could have prevented by the exercise of ordinary care; and for any other negligent or wilful act or nonfeasance in his administration of the estate by which loss to the estate arises.

Comment. Section 172(b) (1) covers cases of damages received under wrongful death statutes, or appointed property where the decedent was the donee of a general power of appointment and was insolvent.

Section 172(b) (2) includes a situation where a personal representative commingles the proceeds of a life insurance policy with assets of the estate, although the estate is not the beneficiary of the policy. For a discussion of this matter, see 29 Va. L. Rev. 951 (1943).

§ 173. Duty to close estate. Every personal representative shall close the estate as promptly as possible. The time for closing the estate shall not exceed nine months from the filing of the petition for the appointment of a personal representative unless for cause the time is extended by the court.

§ 174. When personal representative must account. Every personal representative must file in the court a verified account of his administration

- (a) Upon filing a petition for final settlement;

- (b) Upon the revocation of his letters;
- (c) Upon his application to resign and before his resignation is accepted by the court;
- (d) Annually during the period of administration unless the court otherwise directs;
- (e) At any other time when directed by the court either of its own motion or on the application of any interested person.

§ 175. What accounts to contain. Accounts rendered to the court by a personal representative shall be for a period distinctly stated and shall consist of three schedules, of which the first shall show the amount of the property according to the inventory, or, if there be a prior accounting, the amount of the balance of the next prior account, and all income and other property received, and gains from the sale of any property or otherwise; the second shall show payments, charges, losses and distributions; the third shall show the property on hand constituting the balance of such account, if any, by reference to the inventory or otherwise. When an account is filed, the personal representative shall also file receipts for disbursements of assets made during the period covered by the account. The court may provide for an inspection of the balance of assets on hand.

Comment. This is modeled after Mass. Ann. Laws (1932) c. 206, § 2. See § 143(b) as to administration expenses to be allowed at accounting before payment.

§ 176. Account to include petition for settlement and distribution. At the time of filing of an account the personal representative shall petition the court to settle and allow his account; and if the estate is in a proper condition to be closed, he shall also petition the court for an order authorizing him to distribute the estate, and shall specify in the petition the per-

sons to whom distribution is to be made and the proportions or parts of the estate to which each is entitled.

§ 177. Hearing on settlement of account; notice.

Upon the filing of any account, the matter shall be set for hearing and notice thereof shall be given. If there is also a petition for distribution, it shall be heard at the same time as the account, and the notice of hearing on the account shall so state.

§ 178. Objections to account. At any time prior to the hearing on an account of a personal representative, any interested person may file written objections to any item or omission in the account. All such objections shall be specific and shall indicate the modification desired.

§ 179. Conclusiveness of order settling account. Upon the approval of the account of a personal representative, the personal representative and his sureties shall, subject to the right of appeal and to the power of the court to vacate its final orders, be relieved from liability for the administration of his trust during the accounting period, including the investment of the assets of the estate. The court may disapprove the account in whole or in part and surcharge the personal representative for any loss caused by any breach of duty.

§ 180. Statement of receipts and disbursements after final account and before final distribution. Any receipts and disbursements of the personal representative subsequent to the filing of his final account must be reported to the court before making final distribution. A settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order of distribution, or the court may treat such statement as a supplementary account and order notice to be given as in other cases of the settlement of accounts.

Comment. Similar to Cal. Prob. Code Ann. (Deering, 1944) § 1020.5.

§ 181. Account of deceased or incompetent personal representative. If the personal representative dies or becomes incompetent, his account may be presented by his personal representative or the guardian of his estate to, and settled by, the court in which the estate of which he was personal representative is being administered, and, upon petition of the successor of the deceased or incompetent personal representative, the court shall compel the personal representative or guardian of the deceased or incompetent personal representative to render an account of the administration of the estate of the decedent and the court shall settle the account as in other cases.

Comment. This is substantially identical with Cal. Prob. Code Ann. (Deering, 1944) § 932.

DISTRIBUTION AND DISCHARGE

§ 182. Partial distribution.

(a) Delivery of specific property to distributee before final decree. Upon application of the personal representative or of any distributee, with or without notice as the court may direct, the court may order the personal representative to deliver to any distributee who consents to it, possession of any specific real or personal property to which he is entitled under the terms of the will or by intestacy, provided that other distributees and claimants are not prejudiced thereby. The court may at any time prior to the decree of final distribution order him to return such property to the personal representative, if it is for the best interests of the estate. The court may require the distributee to give security for such return.

(b) Distribution of part of estate. After the expiration of the time limited for the filing of claims and before final

settlement of the accounts of the personal representative, a partial distribution may be decreed, with notice to interested persons, as the court may direct. Such distribution shall be as conclusive as a decree of final distribution with respect to the estate distributed except to the extent that other distributees and claimants are deprived of the fair share or amount which they would otherwise receive on final distribution. Before a partial distribution is so decreed, the court may require that security be given for the return of the property so distributed to the extent necessary to satisfy any distributees and claimants who may be prejudiced as aforesaid by the distribution.

Comment. The two subsections of § 182 are designed to accomplish quite different things. The purpose of subsection (a) is to take care of a case where there is a specific thing which can much more conveniently remain in the possession of an heir or devisee than of the personal representative. Thus, a musical instrument, a painting or a valuable piece of furniture would have to be stored by the personal representative at the expense of the estate unless some such provision as this exists. This subsection also applies to real estate so that a specific tract of land may under its terms be turned over to a particular distributee.

Subsection (b), unlike the preceding subsection, provides for a more or less final distribution of a part of the estate. The partial distribution may consist either in a cash payment or in the distribution of specific real or personal property. Subsection (a), on the other hand, merely involves the handing over of the possession of specific things for all or a part of the period of distribution, and may be employed merely for the convenience of the personal representative.

§ 183. Decree of final distribution.

(a) **Petition for decree.** After the expiration of the time limit for the filing of claims, and after all claims against the estate, including state and federal inheritance and estate taxes, have been finally determined and paid, except contingent and unmatured claims which cannot then be paid, the personal representative shall, if the estate is in a condition to be closed, render his final account and at the same time petition the court

to decree the final distribution of the estate. Notice of the hearing of the petition shall be given to all interested persons.

(b) What decree to include. In its decree of final distribution, the court shall designate the persons to whom distribution is to be made, and the proportions or parts of the estate, or the amounts, to which each is entitled under the will and the provisions of this Code, including the provisions regarding advancements, election by the surviving spouse, lapse, renunciation, adjudicated compromise of controversies and retainer. Every tract of real property so distributed shall be specifically described therein. The decree shall find that all state and federal inheritance and estate taxes are paid; and if all claims have been paid, it shall so state; otherwise the decree shall state that all claims except those therein specified are paid and shall describe the claims for the payment of which a special fund is set aside, and the amount of such fund; if any contingent claims which have been duly allowed are still unpaid and have not become absolute, such claims shall be described in the decree, which shall state whether the distributees take subject to them. If a fund is set aside for the payment of contingent claims, the decree shall provide for the distribution of such fund in the event that all or a part of it is not needed to satisfy such contingent claims. If a decree of partial distribution has been previously made, the decree of final distribution shall expressly confirm it, or, for good cause, shall modify said decree and state specifically what modifications are made.

(c) Provisions for deceased distributees. If a distributee dies before distribution to him of his share of the estate, such share may be distributed to the personal representative of his estate, if there be one; or if no administration on his estate is had and none is necessary according to the provisions of sections 86 to 91 inclusive, hereof, the share of such distributee shall be distributed in accordance therewith.

(d) **Conclusiveness of decree.** The decree of final distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the decree. It shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees.

(e) **Recording of decree.** Whenever the decree of final distribution includes real property, a certified copy thereof shall be recorded by the personal representative in every county of this state in which any real property distributed by the decree is situated. The cost of recording such decree shall be charged to the estate.

Comment. Under the provisions of this Code, the decree of final distribution, and not the will, is the significant muniment of title. Hence, if real estate is involved, provision is made for recording a copy of the former but not of the latter. If this is done, no one should, or is likely to, purchase real estate in reliance on the will, even though it has been admitted to probate; but he will rely solely on the recorded, certified copy of the decree of distribution.

It is believed that little would be gained and considerable confusion would result if it were provided, as some states do, that the property may be distributed to the assignee of an heir or devisee. See part (3) of the appendix note to this section. This section does not deny the right of the assignee to pursue an appropriate remedy to reach the interests of his assignor, nor does it prevent his intervention at various stages of the probate proceeding as an interested person under § 3(k).

§ 184. Order in which assets appropriated; abatement.

(a) **General rules.** Except as provided in subsection (b) hereof, shares of the distributees shall abate, for the payment of claims, legacies, the family allowance, the shares of pretermitted heirs or the share of the surviving spouse who elects to

take against the will, without any preference or priority as between real and personal property, in the following order:

- (1) Property not disposed of by the will;
- (2) Property devised to the residuary devisee;
- (3) Property disposed of by the will but not specifically devised and not devised to the residuary devisee;
- (4) Property specifically devised.

A general devise charged on any specific property or fund shall, for purposes of abatement, be deemed property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

(b) Contrary provisions, plan or purpose. If the provisions of the will or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

Comment. A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section lay down rules which may be regarded as approximating his intent. However, his intent may be indicated not only by an express designation of a property or fund or by an express statement of the order in which assets are to be applied, but also by the implied purpose of the devise or by the general testamentary plan. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies. Moreover, the general testamentary plan is often important in determining matters of abatement when the surviving spouse elects to take against the will. The same may be true where abatement takes place to provide for the share of a pretermitted heir. The provisions of subsection (b) embrace these and other situations of similar character.

§ 185. Contribution. When real or personal property which has been specifically devised, or charged with a legacy, shall be sold or taken by the personal representative for the payment of claims, general legacies, the family allowance, the shares of pretermitted heirs or the share of a surviving spouse who elects to take against the will, other legatees and devisees shall contribute according to their respective interests to the legatee or devisee whose legacy or devise has been sold or taken, so as to accomplish an abatement in accordance with the provisions of section 184 hereof. The court shall, at the time of the hearing on the petition for final distribution, determine the amounts of the respective contributions and whether the same shall be made before distribution or shall constitute a lien on specific property which is distributed.

§ 186. Determination of advancements. All questions of advancements made, or alleged to have been made, by an intestate to any heir may be heard and determined by the court at the time of the hearing on the petition for final distribution. The amount of every such advancement shall be specified in the decree of final distribution.

§ 187. Right of retainer. When a distributee of an estate is indebted to the estate, the amount of the indebtedness, if due, or the present worth of the indebtedness, if not due, may be treated as an offset by the personal representative against any testate or intestate property, real or personal, of the estate to which such distributee is entitled; but such distributee shall be entitled to the benefit of any defense which would be available to him in a direct proceeding for the recovery of such debt.

Comment. With the exception of the last clause, this is substantially the same as Ohio Gen. Code (Page, 1937) § 10509-186. The last clause follows Ala. Code (1940) t. 61, § 360, and marks a departure from the common-law rule according to which the right of

retainer was permitted with respect to debts barred by the statute of limitations or a discharge in bankruptcy. This prevents litigation such as has arisen in connection with these matters. See comment in 34 Mich. L. Rev. 395 (1936). As to the broad meaning of "offset," see § 144 and comment thereto.

§ 188. Interest on general legacies. General legacies shall bear interest at the legal rate for a period beginning nine months from the filing of the petition for the appointment of a personal representative until the payment of such legacies, unless a contrary intent is indicated by the will.

§ 189. Exoneration of encumbered property. When any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides expressly or by necessary implication that such mortgage be otherwise paid. The term "mortgage" as used in this section shall not include a pledge of personal property.

Comment. The purpose of this section is to abolish the common-law rule that the devise of specific property subject to an encumbrance is entitled to exoneration out of the personal estate. The basis of the common-law rule that the personal estate has benefited from the creation of the debt all too often has no foundation in fact. The other basis of the rule that the decedent's personalty is the primary fund for the payment of debts is no longer tenable. Furthermore, it is contrary to the express provisions of § 150 of this Code.

The doctrine of exoneration in any case rests upon an expressed or presumed intention. Consequently the terms of the act are restricted to mortgages, which include by definition vendors' liens and deeds of trust. See § 3(q) hereof. But pledges of personal property are excluded from the operation of this section.

The language of this section follows N. Y. Dec. Est. Law, § 20, which in turn was borrowed from the English Real Estate Charges Act, 17-18 Vict., c. 113 (1854), as amended by 30-31 Vict., c. 69 (1867) and 40-41 Vict., c. 34 (1877). Compare § 149 hereof, which deals with the privilege of the personal representative to pay off encumbrances, as distinguished from this section, which deals with the right of the distributee to require the personal representative to pay off encumbrances.

§ 190. Payment to distributees in kind.

(a) **When distributees to take in kind.** When the estate is otherwise ready to be distributed, it shall be distributed in kind, unless the terms of the will otherwise provide or unless a partition sale is ordered. Except as provided in subsection (b) hereof, any general legatee may elect to take the value of his legacy in kind, and any distributee, who by the terms of the will is to receive land or any other thing to be purchased by the personal representative, may, if he notifies the personal representative before the thing is purchased, elect to take the purchase price or property of the estate which the personal representative would otherwise sell to obtain such purchase price.

(b) **Exception where will directs purchase of annuity.** If the terms of the will direct the purchase of an annuity, the person to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for such purchase in lieu of such annuity except to the extent that the will expressly provides that an assignable annuity be purchased. Nothing herein contained shall affect the rights of election by a surviving spouse against a testamentary provision as provided in this Code.

Comment. It is not clear in all jurisdictions that a distributee of personal property can elect to take a general or residuary legacy in any form except in cash. See Atkinson, Wills (1937) §§ 229, 262. However, it would seem that there is no good reason why the distributee should not be permitted to take in kind if he desires. Such is the effect of subsection (a) hereof.

If a testator directs his executor to purchase specific property and deliver it to a devisee, it is commonly held that the devisee may elect to take the money set aside for this purpose. See cases collected in 130 A. L. R. 1379 at 1394. This is because the devisee could immediately sell the property and get the money, and it would be a useless thing to compel him to take the property if he prefers the money set aside for its purchase. That situation, however, is clearly distinguishable from a direction in the will to purchase an annuity. The only reason for such a direction is that the testator wished the legatee to have an as-

sured income for life, and did not wish to give him a lump sum which he might spend foolishly. Thus, to allow the legatee to take the price of the annuity would defeat the testator's intent. If the legatee receives the annuity, he cannot readily convert it into cash; indeed, by the terms of the annuity contract, it may not be assignable at all. The direction in a will to purchase an annuity for a legatee is doubtless intended to operate much like a trust to pay income to a named beneficiary and to withhold the principal until a future date. Thus, if A devises a sum of money to T on trust to pay the income to B until B is thirty years of age, and then to pay him the corpus of the trust, the great weight of authority in the United States is to the effect that the trust is indestructible until B reaches the named age, and that the beneficiary cannot demand a termination of the trust prior to that time. The leading case to that effect is *Clafin v. Clafin*, 149 Mass. 19, 20 N. E. 454 (1889). And see *Restatement, Trusts* (1935) § 337, comment j; 3 *Scott, Trusts* (1939) § 337.3. In England, however, it is held that the sole beneficiary of such a trust, who is *sui juris*, may secure a termination of the trust. *Saunders v. Vautier*, 4 Beav. 115 (1841). Following the analogy of *Clafin v. Clafin*, *supra*, it would seem that American courts should hold that, even in the absence of statute, a direction in a will that an annuity be purchased should be given effect and that the legatee cannot demand the price of the annuity. It was, indeed, so held in *Berry v. President and Directors of the Bank of Manhattan Co.*, 133 N. J. Eq. 164, 31 A. (2d) 203 (1943). But in *Parker v. Cobe*, 208 Mass. 260, 94 N. E. 476 (1911), and in a few other cases, it was held that the annuitants could demand the price of the annuity. It is possible that these cases may have been influenced by English decisions to that effect and may have overlooked the fact that the English cases could be justified under the doctrine of *Saunders v. Vautier*, *supra*, which is not the law in most of the United States. In New York it was necessary to provide by legislation that the annuitant, in the situation under consideration, cannot receive the price of his annuity if that is contrary to the intent of the testator as indicated by the will. See *Estate of Cole*, 219 N. Y. 435, 114 N. E. 785, Ann. Cas. 1918 E 807 (1916); N. Y. Dec. Est. Law, § 47b. The New York statute is believed to establish the better rule. Such is the effect of subsection (b) hereof. In general, see 3 *Scott, Trusts* (1939) § 346; 41 *Mich. L. Rev.* 276 (1942).

• **§ 191. Partition for purpose of distribution.** When two or more distributees are entitled to distribution of undivided interests in any real or personal property of the estate,

distribution shall be made of undivided interests therein unless the personal representative or one or more of such distributees shall petition the court not later than the hearing on the petition for final distribution, to make partition thereof. If such petition is filed, the court, after such notice to all interested persons as it shall direct, shall proceed to make partition, allot and divide the property in the same manner as provided by the statutes with respect to civil actions for partition, so that each party receives property of a value proportionate to his interest in the whole, and for that purpose the court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party. If partition is made in kind, the court may appoint two commissioners to partition said property, who shall have the powers and perform the duties of [commissioners] in civil actions for partition, and the court shall have the same powers with respect to their report as in such actions. In case equal partition cannot be had between the parties without prejudice to the rights or interests of some, partition may be made in unequal shares and by awarding judgment for compensation to be paid by one or more parties to one or more of the others. Any two or more parties may agree to accept undivided interests. Any sale under this section shall be conducted and confirmed in the same manner as other probate sales. The expenses of the partition, including reasonable compensation to the commissioners for their services, shall be equitably apportioned by the court among the parties, but each party must pay his own attorney's fees. The amount charged to each party shall constitute a lien on the property allotted to him.

Comment. The above section is modeled after Cal. Prob. Code Ann. (Deering, 1944) §§ 1100-1105.

§ 192. Disposition of unclaimed assets.

(a) **Heirs unknown.** If there shall be no known heir of the decedent, all of his net estate not disposed of by will shall

be ordered paid to the [state treasurer] to become a part of the [state escheat fund], subject to the further provisions of this section.

(b) Unclaimed property or money. If any distributee or claimant cannot be found, the personal representative shall sell the share of the estate to which he is entitled, pursuant to an order of court first obtained, and pay the proceeds to the [state treasurer] to become a part of the [state escheat fund].

(c) Receipts to be given and filed. When the personal representative shall pay any money to the [state treasurer] pursuant to this section, he shall take a receipt therefor and file it with the court with the other receipts filed in the proceeding. Such receipt shall be sufficient to discharge the personal representative in the same manner and to the same extent as though such distribution or payment were made to a distributee or claimant entitled thereto.

(d) Refunds of money so paid. The moneys received by the [state treasurer] pursuant to the provisions of this section shall be paid to the person entitled on proof of his right thereto or, if the [state treasurer] refuses or fails to pay because he is doubtful as to his duties in the premises, such person may apply to the court in which the estate was administered, whereupon the court upon notice to the [state treasurer] may determine the person entitled thereto and order the [treasurer] to pay the same accordingly. No interest shall be allowed thereon and such distributee or claimant shall pay all costs and expenses incident to the proceedings. If such proceeds are not paid or no application is made to the court within seven years after such payment to the [state treasurer], no recovery thereof shall be had.

Comment. See § 22(b)(6) as to escheat.

§ 193. Discharge of personal representative. Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree,

the court shall enter an order of discharge. The discharge so obtained shall operate as a release from the duties of personal representative and shall operate as a bar to any suit against the personal representative and his sureties unless such suit be commenced within two years from the date of the discharge.

Comment. This section follows very closely the language of Fla. Stat. Ann. (1941) § 734.23. There is danger of confusion arising from the language of some statutes, as to the precise significance of the term discharge. As used in this Code, a discharge does not mean that the personal representative is thenceforth absolved from all liability for his acts in his official capacity. As this section clearly indicates, he is not relieved from liability for past acts by a discharge, but merely ceases to be under any further duties to act as personal representative. Therefore, the last clause of this section is needed to bar his liability for past acts by lapse of time, if no suit is brought. Of course, the settlement of the account of a personal representative would be a bar to most proceedings to impose liability for his acts prior to that time. See § 179.

§ 194. Reopening administration. If, after an estate has been settled and the personal representative discharged, other property of the estate shall be discovered, or if it shall appear that any necessary act remains unperformed on the part of the personal representative, or for any other proper cause, the court, upon the petition of any person interested in the estate and, without notice or upon such notice as it may direct, may order that said estate be reopened. It may reappoint the personal representative or appoint another personal representative to administer such property or perform such acts as may be deemed necessary. Unless the court shall otherwise order, the provisions of this Code as to an original administration shall apply to the proceedings had in the reopened administration so far as may be; but no claim which is already barred can be asserted in the reopened administration.

Comment. Under the provisions of this section, an estate may be reopened solely for the purpose of determining distributees. See comment to § 195. In such a case no appointment of a personal representative is necessary.

§ 195. Determination of heirship.

(a) **When proceedings may be had.** Whenever any person has died leaving property or any interest therein and no administration has been commenced on his estate in this state, nor has any will been offered for probate in this state, within five years after his death, any person claiming an interest in such property as heir or through an heir may file a petition in any court which would be of proper venue for the administration of such decedent's estate, to determine the heirs of said decedent and their respective interests as heirs in the estate.

(b) **Contents of petition.** The petition shall state

- (1) The name, age, domicile and date of death of the decedent;
- (2) The names, ages and residence addresses of the heirs, so far as known or can with reasonable diligence be ascertained;
- (3) The names and residence addresses of any persons claiming any interest in such property through an heir, so far as known or can with reasonable diligence be ascertained;
- (4) A particular description of the property with respect to which such determination is sought;
- (5) The net value of the estate.

(c) **Procedure.** Upon the filing of the petition, the court shall fix the time for the hearing thereof, notice of which shall be given to

- (1) All persons known or believed to claim any interest in the property as heir or through an heir of the decedent,
- (2) All persons who may at the date of the filing of the petition be shown by the records of conveyances of the county in which any real prop-

erty described in such petition is located to claim any interest therein through the heirs of the decedent and

(3) Any unknown heirs of the decedent.

Such notice shall be given by publication and, in addition, personal notice or notice by registered mail shall be given to every such person whose address is known to the petitioner. Upon satisfactory proofs the court shall make a decree determining the heirs of said decedent and their respective interests as heirs in said property.

(d) Certified copy of decree to be recorded. A certified copy of the decree shall be recorded at the expense of the petitioner in each county in which any real property described therein is situated, and shall be conclusive evidence of the facts determined therein as against all parties to the proceedings.

Comment. In the administration of a decedent's estate normally the heirs will be determined in connection with the decree of distribution on final settlement. In two situations, however, something more is needed: (1) where the decree of distribution fails to cover some of the property of the estate, either because its existence was unknown at the time of the decree, because it was then believed to have belonged to some person other than the decedent or merely because of a mistake in the wording of the decree; and (2) where no administration has been commenced and the time for commencing administration has, by the provisions of § 83, expired. In the first situation, no determination of heirship, as such, is needed. The administration can be reopened under the provisions of § 194 solely for the purpose of amending the decree of distribution, and the modifications of this decree will accomplish everything which a separate determination of heirship could accomplish. The provisions of this section are, therefore, limited to the second situation. Here, neither probate nor administration is possible because the five-year limitation provided in § 83 operates as a bar. Moreover, under § 135(d) all creditors' claims would be barred as no administration is commenced within five years after the decedent's death.

The sole purpose of this section is to determine the title to the property of the estate or to a designated part of it. Only after the expiration of the five-year period is this possible, since otherwise the rights of creditors must be determined, and the proceeding for the determi-

nation of heirship does not deal with creditors' rights. If a determination of heirship is desired prior to the expiration of the five-year period of limitation, a proceeding to administer the estate or to probate the will should be initiated; or, if it has already been initiated and closed, it should be reopened.

PART IV. GUARDIANSHIP

INTRODUCTORY COMMENT

Few fields of the law have been as much neglected in recent decades as that of guardianship. Even the recent probate codes, while they have advanced the statutory law of administration of decedents' estates, have apparently considered the law of guardianship as a relatively unimportant appendage. Recent decisions on the subject are seldom of a distinguished character. Little periodical literature exists and there has not been a standard American text exclusively devoted to the field since Woerner's *American Law of Guardianship* appeared in 1897.

Like Topsy, the law of guardianship just grew, and it grew in a very illogical fashion. At common law the father and on his death the mother was the natural guardian of minor children without judicial appointment, and, as such, entitled to their custody. *Ferguson v. Phoenix Mut. Life Ins. Co.*, 84 Vt. 350, 79 A. 997 (1910). By statute in many states the father and mother are entitled to joint custody, e.g., Cal. Civ. Code (Deering, 1941) § 197. Parents, of course, have the duty to support their minor children; but as parents they have no control over the property of the children except the right to the children's earnings. These phases of the law are parts of the law of parent and child, which this Code assumes but with which it does not specifically deal. See, however, § 224(b).

The cases sometimes speak of one who wrongfully takes possession of an incompetent's property or assumes to act as his guardian without authority, as a *de facto* guardian or guardian *de son tort*. *Kies v. Brown*, 222 Iowa 54, 268 N. W. 910 (1936). However, this office is a mere fiction—*Burch v. State*, 4 Gill & J. (Md.) 444 (1832)—and the remedy of the lawful guardian or of the incompetent upon becoming competent proceeds upon ordinary principles of the law of torts or restitution.

Guardianship in chivalry, or the right of the lord to take charge of the infant's person and property, was abolished by 12 Car. II, c. 24 and never prevailed in this country. Guardianship by *socage* arose out

of land held in socage tenure. It devolved upon the nearest of kin who could not inherit the property and terminated when the minor became fourteen years of age. N. Y. Dom. Rel. Law, § 80, provides for guardianship of property with the rights, powers and duties of a guardian in socage. However, the common law peculiarities of this form of guardianship no longer exist in New York and the term is of little significance there. *Matter of De Saulles*, 101 Misc. 447, 167 N. Y. S. 445 (1917); *Woerner, Guardianship* (1897) §§ 14, 23.

By virtue of an English statute, 12 Car. II, c. 24, § 8, a father by his will could appoint a guardian of the person and of the estate of his children during their minority. This testamentary guardianship sprang from the will and required no judicial confirmation. In the United States the testamentary guardianship is common. Some statutes make no requirement of judicial confirmation but the tendency has been to require the guardian so nominated to qualify and give bond just as any other guardian. *Woerner, Guardianship* (1897) §§ 15, 20; *Madden, Domestic Relations* (1931) § 147. This Code does not recognize the office of testamentary guardian as such. It requires judicial appointment in all cases, though under § 203 the court is directed to give due regard to the parent's testamentary request for the appointment of a designated person as guardian.

At an early date the English Court of Chancery assumed jurisdiction to appoint guardians (at least of the estate) of minors. This was a general guardianship, quite distinct from the office of guardian ad litem. *Woerner, Guardianship* (1897) § 16. This phase of equity power has been recognized in some of the states of this country, resulting in concurrent jurisdiction to appoint guardians in equity and probate courts. *Matter of De Saulles*, 101 Misc. 447, 167 N. Y. S. 445 (1917); *In re Sall*, 59 Wash. 539, 110 P. 32, 626 (1910). More generally perhaps, the jurisdiction over guardianships given by state constitutions and statutes to courts of probate has been deemed to be exclusive and to prevent courts of equity from exercising such power. *Denton v. James*, 107 Kan. 729, 193 P. 307, 12 A. L. R. 1146 (1920); *Leclerc v. Leclerc*, 85 N. H. 121, 155 A. 249, 74 A. L. R. 1348 (1931). As to the distinction between appointment of a guardian of the person and the award of custody in a divorce case, compare the last cited case with *Stafford v. Stafford*, 299 Ill. 438, 132 N. E. 432 (1921), where the court of equity had general jurisdiction over guardianships. The wording of § 199 of this Code, of course, precludes the possibility of a chancery guardian.

Failure on the part of some members of the profession to realize the precise legal status of the estate under guardianship has been the source of much difficulty. This matter is well considered in an opinion

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of Chief Justice Shaw in *Conant v. Kendall*, 21 Pick. (38 Mass.) 36, 38 (1838):

"There is considerable difficulty in treating the estate of a ward, in the custody and under the control of a guardian, as an estate held in trust by the guardian. He is appointed to take charge of the property and manage it for the benefit of the ward; but apparently the property remains vested in the ward, so that upon the death or resignation of the guardian there is no change of property. There is a manifold distinction in this respect, between the case of a guardian and that of an executor or administrator. The original owner being dead, the personal property must vest in some one; and by operation of law it vests in the executor or administrator, and is deemed so vested by relation, from the decease of the owner."

There is no reason why this rule and the concomitant principles that the guardian acts in his own name, incurs personal liability for his acts and is sued in his own name with reference to such acts, securing reimbursement in proper cases from the estate, may not be changed by statute. However, the Model Probate Code proceeds in the main upon orthodox principles. See §§ 227, 228. There is no special nonclaim statute relative to claims, as there is in some states. Title to the property is in the ward, § 221.

The Code does depart from common law in certain important respects. Thus, one having a claim of any nature against the ward or the guardian may procure its allowance by filing a claim with the court. § 227. Again, all actions which seek to benefit or charge the estate are brought by or against the guardian as such. § 228. These provisions do not alter the substantive common-law principle of personal liability of the guardian for his own transactions; they are merely procedural short-cuts which enable one to reach the assets of the estate directly instead of requiring him to pursue the guardian personally and forcing the latter to secure reimbursement from the estate assets.

A frequent source of difficulty is that the term guardian is used both for the custodian of the person and for the custodian of the estate. Statutes frequently leave in doubt whether the term is used to mean guardian of the person, or guardian of the estate, or both. The fact that the same person is often both adds to the confusion. The rights and duties connected with the two offices are quite different. The situation is much the same as if the law of parent and child purported to state the legal relations when the father was a trustee for the benefit of the son. The applicable principles are distinct and harm may result from considering the matters in the same code, particularly when there is confusion of legal nomenclature. Furthermore, many

of the problems of guardianship of the person lie outside of legal procedure and come within the realm of social work.

The Model Probate Code is primarily a property code. The major part of it deals with decedents' estates wherein are included only property rights and procedural rules to bring these rights into effect. Nevertheless, again in accordance with tradition, the Code deals with guardianships of the person as well as of the estate. There is not only an awareness of the problems of custody of the person but specific and distinct provisions therefor. See §§ 200, 202, 203, 212, 213, 216, 219(a), 220, 223, 234(a)(2). However, there are limits beyond which the Code could not go in this regard. It does not purport to codify the law of parent and child, nor to indicate methods of dealing with juvenile delinquency, nor to provide for the commitment of insane persons. Some or all of these are proper subjects for study and for legislative enactment based on that study, but they lie outside of the undertaking of the Code. Finally, on account of the recent dearth of legislative and scholarly development of the subject of guardianship the Model Probate Code is necessarily a more nearly pioneer undertaking with regard to guardianships than with regard to decedents' estates.

It will be noted that the Uniform Veterans' Guardianship Act is contained as a separate portion of Part IV. There is every reason why the various states should pass this act even if they are not prepared to follow the other provisions of the Model Probate Code. Not only does this act take care of the peculiar problems of incompetent veterans and their dependents but under the statutes and regulations of the Federal government there must be compliance with many of the provisions of the act in order to secure Federal compensation. Hence, it is desirable to have the act on the statute books as a guide for guardians of veterans and for the state courts having guardianship jurisdiction. Some of the provisions of Part IV A are modeled after the uniform act. See §§ 225, 226. However, the uniform act does not fit the needs of a general guardianship code—first, because the act presupposes and leans on a general guardianship code in some particulars; second, because some of the safeguards of the uniform act are designed to prevent veterans' guardianships from becoming a racket and the provisions would be too onerous for guardianships generally. Of course in veterans' guardianship cases the provisions of the uniform act take precedence under the Model Probate Code. Where that act makes no provision the general law of guardianship will be applied. § 197.

The analogy between procedure in guardianships and in decedents' estates is apparent and has been recognized in many existing codes. / In some of them this is accomplished by the enactment of subdivisions

dealing with fiduciaries in general. See, for example, the Michigan Probate Code, which includes a chapter on "General Provisions Concerning Fiduciaries," and chapters on "Claims" and "Sale, Mortgage or Lease of Property," covering guardianships as well as decedents' estates.* Other states have made use of the analogy of decedents' estates law by a sweeping provision which adopts in general terms for guardianships all the decedents' estate provisions which are applicable and which are not contrary to the specific provisions on guardianship. The latter method of introducing this analogy is believed to be preferable for there are many particulars in which the law as to the various kinds of fiduciaries must necessarily differ. This method avoids the introduction of an artificial uniformity into the law of fiduciaries.

However, the Model Probate Code is much more certain as to exactly what provisions regarding decedents' estates apply to guardianships, for various sections in Part IV specifically adopt by reference particular sections in Part III, except in case of contrary provisions in Part IV. This is true of § 202 as to qualifications of guardians, § 213 as to bonds, § 216 as to removal of guardians, § 218 as to inventory and appraisal, § 222 as to continuation of business, § 227 as to claims (in this section it is also provided that the remaining sections regarding claims in decedents' estates do not apply), § 230 as to sales and other transfers by the guardian and § 233 as to accounting. Between these instances of incorporation by reference and the specific provisions of Part IV, there is almost complete coverage of all guardianship matters which require a statutory solution. However, to provide for the unusual case, § 198 adopts generally other applicable portions of Part III by analogy.

Moreover, a careful analysis of the law of guardianship discloses that, at some points, it resembles more nearly the law of trusts than that of decedents' estates. Thus, the administration of the estate of a decedent ordinarily involves a more or less immediate distribution. There will ordinarily be no more debts nor assets; and the primary object is to preserve the estate for a short time and then distribute it with fairness to creditors, heirs and devisees. But, like the trust estate, the guardianships may involve a continuous administration over a considerable period of time; new assets may come in and new creditors may arise; throughout it all there is a beneficiary to be maintained. Some statutes recognize the applicability of trust law. For example, § 5882 of the Montana Revised Code (1935) is as follows: "The relation of a guardian and ward is confidential, and is subject to the provisions of this code relative to trusts." The applicability of the law of trusts is recognized specifically in § 225 of the Model Code

as to investments of guardians of the estate, and in general, in § 219(b). A good example of the application of trust law to the law of guardianship is found in the rule that a trustee must use reasonable care and skill to make the trust property productive. See Restatement, Trusts (1935) § 181. This same rule should be applied to determine the duties of a guardian, although the duty of a personal representative may be different. See § 133 of the Model Probate Code.

In some statutory schemes, guardianships of minors and of mentally incompetent persons are treated in more or less separate divisions of the guardianship statutes. Indeed some states also have separate provisions as to spendthrifts, drunkards and the like. The Model Probate Code does not follow this plan of organization of subject matter. For the sake of brevity and of the unification of matters which do not require diverse treatment, the Code as a whole applies to all incompetents, though of course some provisions expressly or implicitly relate only to one class. Of course, provisions as to commitments of insane persons have no application to appointment of a guardian for a minor. The Code does not set forth the procedure for commitments though even this can be inserted in a unified compilation of guardianship matters. See the recently enacted Florida Guardianship Law (1945) § 744.31, which refers to the commitment procedure found elsewhere in the statutes.

Somewhat relative to this problem is the question of permissibility of classifying both minors and insane persons as "incompetents." The definition of the latter term in § 196(c) adopts this scheme, which is followed throughout Part IV B. Clearly a minor is incompetent for the legal purposes having to do with guardianship. With reference to guardianship of the estate, particularly, the same law and procedure is appropriate to both classes. The layman's idea that a stigma is attached to the word "incompetent" can be avoided by using the word "minor" instead of "incompetent" in the entitling of petitions, orders and other documents in estates of minors.

In this connection, it will be noted that the term "mental illness" is included in § 196(c)(2) as to the form of mental incapacity which warrants the appointment of a guardian. This is not intended to enlarge or change the sort of incapacity which is necessary for guardianship, viz., that which renders the person incapable of managing his property or caring for himself. "Mental illness" is included in this section because of the sensitiveness of many persons who would be loath to file a petition declaring that a relative was "insane," while they would readily and truthfully declare that he was "unable to care for himself or his property by reason of mental illness." Indeed the term "insanity" has no definite meaning except in connection with a particular purpose for which the mental state is to be determined.

The features of Part IV can be seen from examination of the various sections. Few, if any, are entirely untried. Of course, the major emphasis is upon the protection of the ward's interest. Of this nature are provisions permitting the agency or institution having supervision of the ward to act as his guardian (§ 202); requiring adequate notice of the petition and subsequent proceedings to be served on the incompetent and others who will likely protect his interest (§§ 206, 207, 208, 209); defining the duties of guardians (§ 219); permitting periodic allowances for support (§ 223); requiring strict court supervision of investments (§ 225); permitting purchase of a home for the incompetent (§ 226); providing for compromise of claims under court order (§ 229); providing for annual accounts which may disclose defaults of the guardians without making the accountings binding on the ward (§ 233). In a number of these and in some other sections the ward is protected by court supervision of the administration with regard to matters which have not been so supervised at common law or under typical statutory systems. Court appointment is required for all guardians and the power to appoint is vested solely in the court having probate jurisdiction. § 199. Some of the provisions inure to the benefit of the guardian though they are not to the disadvantage of the ward. In addition to those already mentioned in this category are the provisions relative to court allowance of claims (§ 227) and the approval of expenditures in advance (§ 233). Finally several provisions expedite or simplify the administration, or dispense with it entirely. See in this connection §§ 205, 229, 235 and 237.

As in the parts dealing with decedents' estates, the statutes of various states have sometimes been used as models. None has been used more frequently than the Florida Guardianship Law, just enacted, to which reference is made in various comments. Indeed, it has been somewhat suggestive as to certain sections where no reference was made to it. The draft of the act was prepared by a committee of the Florida State Bar Association of which D. H. Redfearn was chairman. See 19 Fla. L.J. 75 (March, 1945).

A. GENERAL PROVISIONS

§ 196. Definitions and use of terms. When used in Part IV A, unless otherwise apparent from the context:

- (a) A "guardian" is one appointed by a court to have the care and custody of the person or of the estate, or of both, of an incompetent.

- (b) A "guardian ad litem" is one appointed by a court, in which particular litigation is pending, to represent a ward or an unborn person in that particular litigation.
- (c) An "incompetent" is any person who is
 - (1) Under the age of majority,
 - (2) Incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity, of either managing his property or caring for himself or both.
- (d) A "ward" is an incompetent for whom a guardian has been appointed.

Comment. In large measure this section follows the Florida Guardianship Law (1945) § 744.03. As to "mental illness," see Introductory Comment to Part IV. Except for minors, an incompetent as defined in this section is one whose incapacity is mental. No matter how far a person may be incapacitated physically, he can manage his property and care for himself by an agent or servant if his mind is unimpaired. If so, he does not need a guardian. However, if his mind is such that he is incapable of managing his property or caring for himself, he is an incompetent, even though the mental condition was caused by physical disabilities. Statutes providing for guardianship for incompetents are commonly regarded as referring to the kind of incompetence herein stated. See *Matter of Coburn*, 165 Cal. 202, 131 P. 352 (1913). But in one case a statute was held to provide for guardianship for a person whose incompetence was purely physical and for that reason was held to be unconstitutional in that it constituted a deprivation of the right of "enjoying and defending life and liberty, acquiring, possessing and protecting property." *Shafer v. Haller*, 108 Ohio St. 322, 140 N.E. 517, 30 A.L.R. 1378 (1923). In general as to the constitutionality of statutes providing for guardianship of persons under physical disability, see 37 Harv. L. Rev. 151 (1923); 30 A.L.R. 1381.

§ 197. Relation of Part IV A to Part IV B. The provisions of Part IV A hereof shall extend to the persons specifically provided for under the terms of Part IV B, known as the Uniform Veterans' Guardianship Act. The provisions of

Part IV A shall be cumulative to the provisions of Part IV B; but any conflict arising between Part IV B and the other sections of Part IV shall be resolved by giving effect to the law as stated in Part IV B, in cases to which the latter applies.

Comment. This section follows closely the form of a section in the Florida Guardianship Law (1945) § 744.05.

It should be noted that, if Part IV A and Part IV B should, after enactment, be amended or revised by the legislature, they would be regarded as still having the same relation to each other as is indicated in § 197, unless the legislature should otherwise provide.

§ 198. Application of other parts of Code. The provisions of Part I hereof, unless therein restricted to decedents' estates, apply to guardianships. Where sections in Part III are specifically incorporated by reference by any section of Part IV they shall be applied as if "decedent" read "ward," "personal representative" read "guardian" and the like, as the case may be, as far as applicable to guardianships and not inconsistent with the provisions of Part IV. In other cases, where no rule is set forth for guardianships in Part IV, the rule regarding decedents' estates in this Code shall likewise apply to guardianships when applicable thereto and not inconsistent with the provisions of Part IV, unless a contrary rule of court is promulgated or declared as provided by section 10 hereof.

Comment. Statutes regarding guardianships abound with specific references adopting the procedure in decedents' estates. For examples of more sweeping provisions adopting the decedents' estates law when applicable and when there is no specific provision as to guardianship procedure, see Cal. Prob. Code Ann. (Deering, 1944) § 1606; Tex. Civ. Stat. Ann. (Vernon, 1940) art. 4108.

Of course, when the guardian administers the estate of his deceased ward under § 235 hereof, any of the provisions of Part III might be applied to the administration proceedings contemplated by that section, provided that such provisions of Part III are not inconsistent with the provisions of § 235. This application would not be extensive, however, due to the relative simplicity of most estates which would be administered under § 235.

Only a few sections of Part III could possibly come under the provision of the last sentence of § 198. In this category are such sections as §§ 101, 102, 121, 123, 132(a), 134.

§ 199. Jurisdiction; non-statutory guardianships abolished. The jurisdiction of the [] court over all matters of guardianship, other than guardianships ad litem, shall be exclusive, subject to the right of appeal. All forms of guardianship not expressly provided for in this Code, other than guardianships ad litem, are abolished.

Comment. Chancery and testamentary guardians are abolished by this section. See Introductory Comment to Part IV. For original and appellate jurisdiction in general, see §§ 6, 20 of this Code.

§ 200. Who may be under guardianship. A guardian of the estate may be appointed for any incompetent. A guardian of the person may be appointed for any incompetent except a married minor who is incompetent solely by reason of his minority.

Comment. The reason why the married minor, who is otherwise competent, is not subject to guardianship of the person is that the control of such a guardian might interfere with the relationship of the married pair and might disrupt the marriage. If a person is legally qualified to marry, it should not be necessary to entrust the custody of his person to a guardian. Statutes to this effect are common. See, for example, Cal. Prob. Code Ann. (Deering, 1944) §§ 1433, 1500. On the other hand, in some states, it is provided by statute that the guardianship of a female minor terminates on marriage. See Ala. Code (1940) t. 21, § 134, and Del. Rev. Code (1935) § 4422. This doubtless proceeds upon the theory that, on marriage, the estate, and perhaps also the person, of the female minor comes under the control of her husband and this control is inconsistent with a guardianship. But in view of modern statutes which largely emancipate the married woman this theory would seem to be obsolete. The more logical rule, in view of the position of the married woman in modern law, refuses to recognize any guardianship of the person of any married minor who is otherwise competent. There is no reason, however, why there should not be a guardianship of the estate of a married minor, whether male or female, as this does not interfere in

any way with the marriage relation. See, for example, Kan. Gen. Stat. (Supp. 1943) § 59-1812. See § 234(a)(2) hereof.

§ 201. Venue.

(a) **Proper county.** The venue for the appointment of a guardian shall be:

- (1) In the county in this state where the incompetent resides;
- (2) If the incompetent does not reside in this state, then in any county wherein there is any property of the incompetent.

(b) **Proceedings in more than one county.** If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court shall transmit the original file to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced to appoint a guardian of the estate, or of the person and the estate, shall extend to all of the property of the incompetent in this state.

(c) **Transfer of proceeding.** If it appears to the court at any time before the termination of the guardianship that the proceeding was commenced in the wrong county, or that the residence of the ward has been changed to another county, or in case of guardianship of the estate that it would be for the best interest of the ward and his estate, the court, in its discretion, may order the proceeding with all papers, files and a certified copy of all orders therein transferred to another [] court which other court shall thereupon proceed to complete the proceeding as if originally commenced therein.

Comment. By this section venue for guardianship depends on actual residence of the ward rather than on his technical domicile. Cf. § 61 as to venue in decedents' estates. In most instances it will

promote the best interests of the ward if the proceeding takes place in the county of the state where he actually lives.

Unless he is also the parent, a guardian appointed by the court cannot change the domicile of his ward to another state. Restatement, Conflict of Laws (1934) §§ 37, 40(e); 1 Beale, Conflict of Laws (1935) §§ 37.1, 40.3.

§ 202. Qualifications of guardian. A parent shall not be denied appointment as guardian of the person of a minor ward by reason of such parent being under the age of twenty-one. The [State Welfare Department] or any other public department, bureau or agency of this state or any political subdivision thereof, or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent, may be appointed guardian of the person or of the estate or both. With these exceptions no one is qualified to serve as guardian of the person or of the estate who does not have the qualifications of a personal representative under section 96(b) hereof. No one shall be appointed guardian of the person unless he is qualified to have the care and custody, and in case of a minor ward to provide for the training and education of the ward, and, except as provided in this section, unless he is a natural person.

Comment. See § 210. Most of the states have provisions somewhat similar to the second sentence above, though few are as broad. In some states the guardianship by the agency or institution is confined to guardianship of the person; frequently the statutes are silent as to whether there may also be guardianship of the estate by the agency or institution. Under §§ 96(b) and 203 an official or director of the agency or institution may qualify as guardian. Minnesota permits the director of social welfare to take possession of the estate if it be personal property not exceeding \$1,000 in value. Minn. Stat. (1941) § 256.93 (amended Laws 1943, c. 612). This matter and the question of what agencies and institutions are permitted to act as guardian may be largely matters of local policy and it may be necessary to alter the wording of the second sentence accordingly. Of course, if any of the agencies, institutions or their officers are appointed as guardian they must comply with the provisions of the Code generally, as in case of other appointees, including the provisions as to a bond.

In this section the expressions "supervision, control or custody" and "care and custody" both appear. One or both of them also appear in §§ 196, 204, 206 to 209, 223 and 229. See also § 233 which refers to § 207. "Care and custody" indicate the full powers and duties of a guardian of the person. See §§ 196, 219, 220. In addition, others, including particularly a parent of a minor, may have "care and custody" of an incompetent although not appointed guardian. In particular cases, the State Welfare Department, or other agency or organization may, under the law, have more limited "supervision, control or custody" of an incompetent. Of course one who has "care and custody" of an incompetent would always have "supervision, control or custody," but the reverse would not necessarily be true. The words "which may be charged with" immediately preceding "the supervision, control or custody" in § 202 indicate agencies and organizations which, under the law, are directed or authorized to act with reference to the incompetent, regardless of whether the agency or organization has or has not so acted as to the incompetent. See §§ 207, 208, 209. Cf. §§ 204, 206, 223, 229.

§ 203. Preference in granting letters. The parents of an unmarried minor, or either of them, if qualified, shall be preferred over all others for appointment as guardian of the person. Subject to this rule, the court shall appoint as guardian of an incompetent the one most suitable who is willing to serve, having due regard to: (a) any request for the appointment contained in a will or other written instrument executed by the parent for the appointment as guardian of his minor child; (b) any request made by a minor of the age of fourteen years or over for the appointment as his guardian; (c) any request for the appointment made by the spouse of an incompetent; (d) the relationship by blood or marriage to the person for whom guardianship is sought.

Comment. In many states the statutes provide that a surviving parent may nominate a guardian for his minor child by will, or by will or deed. See Ohio Gen. Code (Page, 1937) § 10507-13. See § 199 and Introductory Comment to Part IV as to testamentary guardians. Another type of statute, which is almost universal, permits a minor over the age of fourteen years to nominate his own guardian subject to the approval of the court. See, for example, Ariz. Code

(1939) § 42-102. Some statutes indicate an order of preference to be followed by the court in appointing a guardian. Thus, it is sometimes provided that parents are to be preferred. See Cal. Prob. Code Ann. (Deering, 1944) § 1407. Or a preference has been accorded to the person of nearest relationship. See Ala. Code (1940) t. 21, §§ 6, 23.

Under the first sentence of § 203 the court should appoint the parent as guardian of the person if he is qualified and application is made for his appointment. See §§ 202, 210. In all other cases, the welfare of the ward is the sole consideration. This section does not require the appointment of the person named in the parent's will nor does it establish any other order of preference. The four factors named in (a) to (d) should be considered by the court, but they are not to be considered in any particular order of priority, nor to the exclusion of other factors, such as the religious faith and race of the proposed guardian of the person and the incompetent. While, if the incompetent's estate is small the court probably will endeavor to select one person to act as both guardian of the person and of the estate, some factors may be of greater weight in the selection of a guardian of the person than in the selection of a guardian of the estate or vice versa. See generally, comment, 33 Cal. L. Rev. 306 (1945).

§ 204. Petition for appointment of guardian. Any interested person may file a petition for the appointment of himself or some other qualified person as guardian of an incompetent. Such petition shall state:

- (a) The name, age, residence, and post office address of the incompetent;
- (b) The nature of his incapacity in accordance with the classification set forth in section 196(c) hereof;
- (c) The approximate value and description of his property, including any compensation, pension, insurance or allowance to which he may be entitled;
- (d) Whether there is, in any state, a guardian for the person or estate of the incompetent;
- (e) The residence and post office address of the person whom petitioner asks to be appointed guardian;
- (f) The names and addresses, so far as known or can reasonably be ascertained, of the persons most closely related by blood or marriage to the incompetent;

- (g) The name and address of the person or institution having the care and custody of the incompetent;
- (h) The names and addresses of wards for whom any natural person whose appointment is sought is already guardian;
- (i) The reasons why the appointment of a guardian is sought and the interest of the petitioner in the appointment.

Comment. This section is patterned to some extent after the Florida Guardianship Law (1945) § 744.30. As to the manner of entitling the petition and subsequent papers and of designating the nature of the incapacity, see Introductory Comment to Part IV.

§ 205. Single guardianship for two or more incompetents. When application is made for the appointment of a guardian for two or more incompetents who are children of a common parent, or are parent and child, or are husband and wife, it shall not be necessary that a separate petition, bond or other paper be filed for each incompetent and the guardianship of all may be considered as one proceeding except that there shall be a separate final accounting when the guardianship terminates as to one ward but not as to the others.

Comment. This section is based on S. D. Code (1939) § 35.1802. Cf. Cal. Prob. Code Ann. (Deering, 1944) § 1440.

§ 206. Participation by [State Welfare Department.] The [State Welfare Department] of this state may petition the court for the appointment or removal of any guardian of the person or of the estate, and may appear as a party in any hearing involving a guardianship. It may at any time investigate and report to the court concerning the care and custody of a ward and the fitness and conduct of his guardian, and shall make such investigation and report whenever ordered to do so by the court.

Comment. Cf. Minn. Stat. (1941) § 259.02 as to notification of the director of social welfare as a step in the adoption of minors. As stated in the comment to § 202, local policy may demand some

alteration of the details concerning notice to, and participation by, social agencies.

§ 207. Notice of hearing on petition for guardianship.

Before appointing a guardian other than a temporary guardian, notice of hearing shall be served upon the following unless they have signed the petition for appointment of the guardian or have waived notice of the hearing:

- (a) The incompetent, if over fourteen years of age;
- (b) The parents if the incompetent is a minor, and the spouse of the incompetent, if any;
- (c) Any other person who has been appointed guardian, or the person having the care and custody of the incompetent, if any;
- (d) At least one of the closest adult relatives of the incompetent by blood or marriage;
- (e) If directed by the court,
 - (1) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward's estate;
 - (2) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent;
 - (3) Any interested person.

If the incompetent is over fourteen years of age, there shall be personal service upon him if personal service can be had. Service on others may be had in accordance with section 14 hereof. The court for good cause shown may reduce the number of days of notice, but in every case at least three days' notice shall be given. It shall not be necessary that the person for whom guardianship is sought shall be represented by a guardian ad litem in the proceedings.

Comment. Cf. Cal. Prob. Code Ann. (Deering, 1944) §§ 1441, 1461; Minn. Stat. (1941) § 525.55; Ohio Gen. Code (Page, 1937) § 10507-4. Under this section the court may require notice to the State Welfare Department. See §§ 206, 208, 209. Service on the parent or the spouse, and in many cases on the person having care and custody of the incompetent, would obviate compliance with service in accordance with (d) above. Of course, under (e)(3) the court could always order service on any particular person.

§ 208. What persons to receive notice of other hearings. Whenever notice of a hearing in a guardianship proceeding is required, notice of hearing shall be served upon the following who do not appear or waive notice of the hearing:

- (a) The guardian of the person;
- (b) The guardian of the estate;
- (c) If directed by the court,
 - (1) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward's estate;
 - (2) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent.
 - (3) Any interested person.

Comment. Sections 207 and 233 provide specially for service of notice of hearing on petition for guardianship and notice of hearing upon accounts. Otherwise § 14 applies as to manner of service.

§ 209. Request for special notice of hearings. At any time after the issuance of letters of guardianship,

- (a) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward's estate, or

- (b) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent, or
- (c) Any interested person

may, in person or by attorney, serve upon the guardian or upon his attorney, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of service, a written request stating that he desires written notice of all hearings on petitions for the settlement of accounts, for the sale, mortgage, lease or exchange of any property of the estate, for allowances of any nature payable from the ward's estate, for the investment of funds of the estate, or for the removal, suspension, or discharge of the guardian or final termination of the guardianship. The applicant for such notice must include in his written request his post office address or that of his attorney. Unless the court otherwise directs, upon filing the request, the person shall be entitled to notice of all such hearings or of such of them as he designates in his request.

Comment. This is analogous to § 67 hereof. It is based on Cal. Prob. Code Ann. (Deering, 1944) § 1600.

§ 210. Proof required for appointment of guardian.

Before appointing a guardian the court must be satisfied:

- (a) That the person for whom a guardian is prayed is either a minor or otherwise incompetent;
- (b) That a guardianship is desirable to protect the interests of the incompetent;
- (c) That the person to be appointed guardian is qualified and is the person most suitable to act as such under this Code.

Comment. As to who is qualified and most suitable to act as guardian, see §§ 202, 203.

§ 211. Determination of incompetency. No guardian of the person or of the estate, or of both, of any person other than a minor, can be appointed until such person has been adjudicated to be incompetent upon sufficient competent evidence in a proceeding instituted for that purpose as provided by law.

Comment. This section assumes that there will be separate provisions for adjudication of incompetency and for commitment to institutions. See Minn. Stat. (1941) §§ 525.75 to 525.79 (amended Laws 1943, c. 612; Laws 1945, c. 425, 490, 567); 13th Ann. Rep. Jud. Council of Mich. (1943) 57; 14th id. (1944) 5; also the provision of the Uniform Veterans' Guardianship Act (§ 255 of this Code). While probate or similar courts are commonly given such jurisdiction, it involves matters quite distinct from the appointment of a guardian. Thus, a person may well be committed to an institution because of minor mental derangements, and yet it may not be desirable either to put him under guardianship or to adjudicate him to be insane. Likewise, statutes should provide specifically for his release from such an institution; but those provisions should be distinct from general guardianship provisions, although they may be included in the same probate code.

§ 212. Order appointing guardian. If on the hearing the court is satisfied that the requirements for the appointment of a guardian as set forth in this Code are proved, the court shall appoint one or two guardians of the person or of the estate or both; but not more than one guardian of the person shall be appointed unless they be husband and wife. The order shall specify the amount of the bond to be given.

Comment. The copy of the order furnished to the guardian could include the provisions of § 219 so that the guardian may be informed in a general way of his duties. This practice might be established by rule of court.

§ 213. Bond of guardian. If the guardianship be of the person only, the amount of the bond shall not exceed \$1,000, or the court may dispense with the bond altogether. At every accounting the court shall inquire into the sufficiency of the

bond and of the sureties, and if either or both are found insufficient the guardian shall be ordered to file a new bond. If by the terms of a will the testator expresses the wish that no bond be required of the person whom he requests to be appointed guardian, that person may be relieved of giving a guardian's bond so far as it applies to property given by the will to the incompetent subject to the conditions specified in section 107(a) hereof. Sections 106 to 118 inclusive hereof with respect to the bonds of personal representatives shall be applicable to the bonds of guardians.

Comment. The bond is for the protection of the ward and his creditors, and also the ward's distributees if the guardian administers his deceased ward's estate under § 235. Under the last sentence the amount of the bond is determined in the same manner as the bond of a personal representative. As to the testamentary request that no bond shall be required, cf. Ala. Code (1940) t. 21, §§ 29, 30. As to time limitations in actions upon the guardian's bond, see § 236 of this Code with which compare § 119.

§ 214. When letters to be issued. When a duly appointed guardian has given such bond as may be required and the bond has been approved by the court, letters under the seal of the court shall be issued to him.

§ 215. Temporary guardian. If the court finds that the welfare of an incompetent requires the immediate appointment of a guardian of his person or of his estate, or of both, it may, with or without notice, appoint a temporary guardian for the incompetent for a specified period not to exceed sixty days, and remove or discharge him or terminate the trust. The appointment may be to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment. The temporary guardian shall make such reports as the court shall direct, and shall account to the court upon termination of his authority. In other respects the provisions of this Code concerning guardians shall apply to tempo-

rary guardians and an appeal may be taken from the order of appointment of a temporary guardian.

Comment. It will be noted that under § 20(b) no appeal is allowed from the order appointing a special administrator, while an appeal is specifically permitted by the terms of § 215 from the order appointing a temporary guardian. The reasons for preventing an improper person from acting as the temporary guardian of the person and estate are more cogent than in the decedent's estate situation where the delay caused by appeals overrides the considerations as to whether the special administrator selected was a proper one. In this regard § 20(b) does not apply to temporary guardianships under § 198 and by their terms §§ 20(c) and 20(d) do not apply in any way to guardianships. So far as may be, other provisions of § 20 apply to appeals in all guardianship matters under § 198.

The above section is suggested by Mass. Ann. Laws (Supp. 1944) c. 201, § 14, but differs in important particulars. A number of states have no provision for special or temporary guardians. Doubtless this is due to the fact that the guardian ad litem often serves the purpose of a temporary guardian. In California and the states whose legislation usually follows California guardians are classified as general or special, the former referring to the general guardian of the estate or of the person or both, the latter to all other guardians. Cal. Prob. Code Ann. (Deering, 1944) § 1401. Michigan allows appointment of a special guardian pending any application for appointment of general guardian or litigation with reference thereto. Mich. Stat. Ann. (1943) § 27.3178(211). Minnesota allows a special guardian to be appointed with or without notice "upon a showing of necessity or expediency." Minn. Stat. (1941) § 525.591. In Texas either a receiver of any incompetent or a temporary guardian of a minor may be appointed until a regular guardian qualifies. Tex. Civ. Stat. Ann. (1940) art. 4129, 4134. See § 105 of the Model Probate Code as to special administrators. While there is doubtless less need for a temporary guardian than for a special administrator, there are some occasions where there should be a temporary guardian.

§ 216. When guardian may be removed. When a minor ward has attained the age of fourteen years, the guardian of his person may be removed on petition of the ward to have another person appointed guardian if it is for the best interests of the ward that such other persons be appointed. A guardian may also be removed on the same grounds and in the

same manner as is provided in section 98 hereof for the removal of a personal representative.

§ 217. Appointment of successor guardian. When a guardian dies, is removed by order of the court, or resigns and such resignation is accepted by the court, the court may appoint another guardian in his place in the same manner and subject to the same requirements as are herein provided for an original appointment of a guardian.

Comment. Sections 216 and 217 correspond to §§ 98 and 99. Section 216 adds the additional provision as to the minor fourteen years of age who wants a different guardian.

§ 218. Inventory and appraisement. When a guardian of the estate has been appointed, an inventory and appraisement of the ward's estate shall be made in the same manner and subject to the same requirements as are provided in section 120 hereof for the inventory and appraisement of a decedent's estate.

§ 219. General duties of guardian.

(a) **Guardian of the person.** It is the duty of the guardian of the person to care for and maintain the ward and, if he is a minor, to see that he is properly trained and educated and that he has the opportunity to learn a trade, occupation or profession. The guardian of the person may be required to report the condition of his ward to the court, at regular intervals or otherwise as the court may direct.

(b) **Guardian of the estate.** It is the duty of the guardian of the estate to protect and preserve it, to invest it prudently, to apply it as provided in this Code, to account for it faithfully, to perform all other duties required by him by law, and, at the termination of the guardianship, to deliver the assets of the ward to the persons entitled thereto. Except as otherwise provided in Part IV hereof, the law of trusts shall apply as

far as may be in determining the duties of a guardian of the estate.

Comment. Except for the last sentence, this section is based upon the Florida Guardianship Law (1945) §§ 744.48 and 744.51. For other types of statutes stating duties of guardians, see Minn. Stat. (1941) § 525.56 and Cal. Prob. Code Ann. (Deering, 1944) § 1500 and following. As to the last sentence of subsection (b), see Introductory Comment to Part IV. Contrasting with the trustee, however, the guardian does not have title to the ward's property. See § 221 and comment thereto.

Under subsection (a), the guardian of the person must see that the child is maintained from the guardian's personal funds if necessary. If the guardian of the person is the parent, or stands in loco parentis, the ward's estate cannot be used for maintenance except as directed by the court under § 224(b). If the guardian of the person is neither the parent, nor a person standing in loco parentis, the ward's property may be used for his maintenance under § 224(a); see also § 223.

Of course, under subsection (a) and § 220 when a guardian of the person of a minor is appointed, other than the parent, the parent's right of custody ceases. However, the guardian of the estate, as such, has no rights or duties relative to the custody of the ward. See § 221.

§ 220. Powers of guardian of the person; custody.

The guardian of the person shall be entitled to the custody of the ward, but shall not have power to bind the ward or his property.

Comment. This is modeled after Florida Guardianship Law (1945) § 744.49.

§ 221. Title and possession of estate. The guardian of the estate shall take possession of all of the ward's real and personal property, and of rents, income, issues and profits therefrom, whether accruing before or after his appointment, and of the proceeds arising from the sale, mortgage, lease or exchange thereof. Subject to such possession, the title to all such estate, and to the increment and proceeds thereof, shall be in the ward and not in the guardian.

Comment. The first sentence follows the Florida Guardianship Law (1945) § 744.52. The second sentence states the common-law

rule as to title. Woerner, Guardianship (1897) § 53. See Introductory Comment to Part IV. Cf. §§ 84, 124 of this Code. As to actions, see § 228.

§ 222. Continuation of business. In all cases where the court deems it advantageous to continue the business of a ward, such business may be continued by the guardian of the estate on order of the court and according to the rules specified in section 131 hereof for the continuation of the business of a decedent by a personal representative when no testamentary provisions are involved.

§ 223. Order for periodic allowance. The guardian of the estate, or the person, department, bureau, agency or charitable organization having the care and custody of a ward may apply to the court for an order directing the guardian of the estate to pay to the person, department, bureau, agency or charitable organization, having the care and custody of the ward, or if the guardian of the estate has the care and custody of the ward, directing the guardian of the estate to apply, an amount weekly, monthly, quarterly, semi-annually or annually, as the court may direct, to be expended in the care, maintenance and education of the ward and of his dependents. In proper cases the court may order payment of amounts directly to the ward for his maintenance or incidental expenses. The amounts authorized under this section may be decreased or increased from time to time by direction of the court. If payments are made to another under such order of the court, the guardian of the estate is not bound to see to the application thereof.

Comment. This section is largely based on the Florida Guardianship Law (1945) § 744.50. Under § 6 of the Model Probate Code the court may require any person to whom an allowance is paid to account therefor. If the guardian of the estate applies the allowance, his regular accounting will cover this matter. See § 233 hereof.

§ 224. Application of income and principal for benefit of ward.

(a) **Income and principal; order of court.** So far as is necessary for the purpose except as provided in subsection (b) hereof, the income of the ward's estate shall be first applied to his care, maintenance and education. On order of the court, any surplus of the income may be applied to the care, maintenance and education of the dependents of the ward. If the income is not sufficient to care for, maintain and educate the ward and his dependents, the court may order the expenditure of such portion of the principal as it deems necessary from time to time for such purposes.

(b) **When parents able to care for ward.** If the ward is a minor, and his parents or those standing in loco parentis are able to care for, maintain and educate him, neither the income nor the principal shall be expended for any purpose except as ordered by the court.

Comment. This section is based to some extent upon § 744.64 of the Florida Guardianship Law (1945). In cases coming under subsection (b) the compensation and necessary expenses of the guardian will of course be ordered by the court. See § 232 hereof.

To the effect that a guardian who stands in loco parentis must ordinarily support the ward though the ward has property of his own, see *Horton's Appeal*, 94 Pa. St. 62 (1880); annotation, 64 A.L.R. 692, 694. As to when the guardian is deemed to stand in loco parentis, see also *Shuey's Estate*, 1 Pa. Super. 405 (1896); cf. *State ex rel. Hickey v. Freeman*, 146 Tenn. 304, 241 S.W. 98 (1921).

§ 225. Investments. The guardian of the estate shall invest the property of the ward in accordance with the rules applicable to investments of trust estates by trustees, except that:

- (a) No investment shall be made without prior order of the court in any property other than unconditional interest-bearing obligations of this state or of the United States and in obligations the interest and

principal of which are unconditionally guaranteed by the United States;

- (b) In all cases the guardian must report in writing his purchase or sale of any trust investment on the date thereof;
- (c) If it is for the best interests of the ward that his specific property be used by the ward rather than sold and the proceeds invested, the court may so order.

Comment. Practically all states have permissive or restrictive provisions regarding trust investments and, in a majority of states, the lists go into considerable detail. 3 Bogert, Trusts (1935) §§ 611-663. Dependent on the judicial interpretation of the language of the statute, the list may be exclusive, or the trustee may be authorized to invest in other securities if he uses ordinary skill and prudence. 3 Bogert, Trusts (1935) § 614. See Restatement, Trusts (1935) § 227 for a statement of the trust investment rule in absence of statute. The above § 225 of this Code would apply the law of trust investments in the particular state, whether common law, statutory or both, to investments by guardians, subject, however, to the three exceptions expressed in § 225. See Uniform Veterans' Guardianship Act (§ 250 of this Code). In accord with this general principle, some states have statutes in which the rule as to trustees applies equally to guardians. Ohio Gen. Code (Page, Supp. 1944) § 10506-41. In other states there are special provisions relative to guardians' investments. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 413; Tex. Civ. Stat. Ann. (Vernon, 1940 and Supp. 1944) art. 4180-4182.

§ 226. Purchase of home. The court may authorize the purchase of real property in which the guardian has no interest, but such purchase can be made only for a home for the ward, or to protect the home of the ward or his interest, or, if he is not a minor, as a home for his dependent family. Such purchase of real property shall not be made except upon order of the court after notice in accordance with section 14 hereof.

Comment. This is similar to the Florida Guardianship Law (1945) § 745.03. Compare, also, the Uniform Veterans' Guardianship Act (§ 252 of this Code).

§ 227. Claims.

(a) **Duty of guardian to pay.** A guardian of the estate is under a duty to pay from the estate all just claims against the estate of his ward, whether they constitute liabilities of the ward which arose prior to the guardianship or liabilities properly incurred by the guardian for the benefit of the ward or his estate and whether arising in contract or in tort or otherwise, upon allowance of the claim by the court or upon approval of the court in a settlement of the guardian's accounts. The duty of the guardian to pay from the estate shall not preclude his personal liability for his own contracts and acts made and performed on behalf of the estate as it exists according to the common law. If it appears that the estate is likely to be exhausted before all existing claims are paid, preference shall be given to prior claims for the care, maintenance and education of the ward and of his dependents and existing claims for expenses of administration over other claims.

(b) **Claims may be presented.** Any person having a claim against the estate of a ward, or against the guardian of his estate as such, may file it with the court for determination at any time before it is barred by the statute of limitations, and, upon proof thereof, procure an order for its allowance and payment from the estate. Any action against the guardian of the estate as such shall be deemed a claim duly filed.

(c) **When decedents' estate law applicable.** The provisions of sections 137, 144 and 146 hereof as to claims against decedents' estates shall be applicable to claims against estates under guardianship, but other provisions regarding claims against decedents' estates shall not apply to estates under guardianship.

Comment. Under this section a guardian may pay a claim without allowance but he does so at his peril. If he has doubt as to whether the court will allow the claim he should withhold payment until the creditor procures allowance of the claim or until the guardian's next

accounting. See § 233(a) hereof. The allowance of a claim is binding upon all persons except that, as between guardian and ward, the latter is permitted to question these as well as other items of the account at any time within two years after the guardian's discharge. See § 233(b).

In some states claims against an estate under guardianship are handled in much the same way as claims against the estate of a decedent. There is a publication of notice to creditors; creditors are required to file their claims; and there is a short nonclaim period after which claims which have not been filed are barred. See Wis. Stat. (1943) § 319.41. Such provisions are believed to be undesirable. In the case of the decedent's estate, presumably there will be no more creditors and no more assets. It is a matter of distributing immediately once and for all as fairly as possible the assets of the dead man. The estate under guardianship is a continuing thing, and more creditors or more assets may come in from time to time. Moreover, if the estate under guardianship is insolvent, the bankruptcy laws apply to secure a fair distribution to creditors. Glenn, *Liquidation* (1935) §§ 36, 38. In the case of the insolvent decedent's estate, the rules for the administration of decedents' estates commonly provide the only method of insuring fair treatment to all creditors. Glenn, *Liquidation* (1935) § 143; cf. Mass. Ann. Laws (1932) c. 216, § 30. Thus, there is no occasion for a nonclaim statute for an estate under guardianship. In general, creditors of the estate under guardianship stand in the same position as creditors of a living person who is not under guardianship. However, they may file their claims if they so desire; they cannot reach the estate by levy, attachment or garnishment and they should sue the guardian as such. See § 228 hereof. In accord with the law in some states, in case of insolvency of a ward of unsound mind the law recognizes a preference for claims even for future maintenance and support of the ward and his family, as against other general creditors. *Adams v. Thomas*, 81 N.C. 296 (1879); cf. *Matter of Application of Otis*, 101 N.Y. 580, 5 N.E. 571 (1886). No precedent is found for imposing liability upon the guardian in bankruptcy proceedings on account of following such direction as is laid down in the last sentence of subsection (a). Indeed, some guardianship statutes indicate that the law of decedents' estates applies as to priority in payment of debts. Colo. Stat. (1935) c. 176, § 196. See generally Comment, 24 Va. L. Rev. 643 (1938).

§ 228. Actions.

(a) **Guardian to sue and be sued.** When there is a guardian of the estate, all actions between the ward or the

guardian and third persons in which it is sought to charge or benefit the estate of the ward shall be prosecuted by or against the guardian of the estate as such. He shall represent the interests of the ward in the action and all process shall be served on him.

(b) Joinder, amendment and substitution. When the guardian of the estate is under personal liability for his own contracts and acts made and performed on behalf of the estate he may be sued both as guardian and in his personal capacity in the same action. Misnomer or the bringing of the action by or against the ward shall not be ground for dismissal of the action and leave to amend or substitute shall be freely granted. If an action was commenced by or against the incompetent before the appointment of a guardian of his estate, such guardian when appointed may be substituted as a party for the incompetent. If the appointment of the guardian of the estate is terminated, his successor may be substituted; if the ward dies, his personal representative may be substituted; if the ward becomes competent, he may be substituted.

(c) Garnishment, attachment and execution. When there is a guardian of the estate, the property and rights of action of the ward shall not be subject to garnishment or attachment, and execution shall not issue to obtain satisfaction of any judgment against the ward or the guardian of his estate as such.

Comment. As to subsection (a) cf. Cal. Prob. Code Ann. (Deering, 1944) § 1208; Ohio Gen. Code (Page, 1937) § 10507-18; Fed. Rules Civ. Proc., Rule 17. There has been much confusion in the various states as to the proper party to sue or be sued in case of guardianship. Woerner, Guardianship (1897) §§ 58, 59. From the practical standpoint it makes little difference whether the guardian or the ward or both are formally named as parties. Any definite rule would be practically as desirable as any other. The Code selects the guardian because he should, in any event, represent the ward's interest in the action.

Subsection (a) applies regardless of whether the action arises out of transactions involving the ward directly or transactions by the

guardian. However, under § 227 a guardian may be sued personally as to the latter, and a creditor may sue the guardian in both capacities in a single action under subsection (b) above.

If there is no guardian of the estate the usual rule is that actions for the incompetent are brought in the infant's name by next friend and actions against him are managed by a guardian ad litem selected by the court in which the action is commenced. These persons are in no sense guardians of the estate and are not entitled to receive the proceeds of the judgment. Their authority terminates when the judgment becomes final. Woerner, *Guardianship* (1897) § 22. The Code does not disturb the local practice in this regard.

The authorities are divided as to whether garnishment, attachment or execution may be employed in an action against an estate under guardianship. Most of the decisions deny the right on the basis that the estate is in custodia legis. Annotation, 92 A.L.R. 919. Creditors' rights are adequately protected by action on the guardian's bond or probate court order for allowance and payment of claims. See §§ 213, 227(b). Cf. § 145. When the guardian incurs personal liability as the result of his own transactions relative to the ward's estate and judgment is obtained against him in his personal capacity, the creditor may obtain execution from the personal assets of the guardian. See § 227 and comment.

§ 229. **Compromise.**

(a) **By guardian.** Whenever it is proposed to compromise or settle any claim by or against the ward or the guardian as such, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, the court on petition of the guardian of the estate, if satisfied that such compromise or settlement will be for the best interests of the ward, may enter an order authorizing the settlement or compromise to be made.

(b) **By parent.** Whenever a minor has a disputed claim, whether arising as a result of personal injury or otherwise, and no guardian of his estate has been appointed, his father, or if his father is dead or the parents of the minor are living separate or apart and his mother then has the care and custody of the minor, then his mother shall have the right to compromise or settle such claim, but before the compromise or set-

tlement is valid, it must be approved by the court upon the filing of a petition. If the court approves the compromise or settlement, it may direct that the money be paid over in accordance with the provisions of section 237 hereof, or may require that a guardian of the estate be appointed and that the money be delivered to such guardian.

Comment. See Ohio Gen. Code (Page, 1937) § 10507-19 for a similar provision. In this section "court" refers to the court having probate jurisdiction regardless of whether or not litigation on the claim is pending in another court. When litigation is pending in another court there are provisions in some states that small claims of a minor for whose estate no guardian has been appointed may be compromised and paid over for the minor's benefit by order of the court in which the litigation is pending. N.Y. Civ. Prac. Act, § 980-a; N.Y. Rules Civ. Prac., Rule 294. Pa. Rules Civ. Proc., Rule 2039 in 332 Pa. lxxxviii. Such provisions seem desirable but they belong in the code of civil procedure rather than in a probate code. See § 237 and comment.

§ 230. Sales, mortgages, leases and exchanges.

(a) **When permitted.** The real or personal property of the ward, or any part thereof, may be sold, mortgaged, leased or exchanged by the guardian of the estate upon such terms as the court may order for the purpose of paying the ward's debts, providing for his care, maintenance and education and the care, maintenance and education of his dependents, investing the proceeds or in any other case where it is for the best interests of the ward.

(b) **Guardian forbidden to purchase.** No guardian shall purchase property of the ward, unless sold at public sale with the approval of the court, and then only if the guardian is a spouse, parent, child, brother or sister of the ward and is a cotenant with the ward in the property.

(c) **What decedents' estate law applicable.** In other respects, the provisions of sections 154, 156 to 167 inclusive, 170 and 171 hereof, relative to decedents' estates apply to sales, mortgages, leases and exchanges of property of the ward.

Comment. Subsection (b) is taken from the Florida Guardianship Law (1945) § 745.14; cf. § 155 of this Code.

§ 231. Sale of ward's property not an ademption. In case of the guardian's sale or other transfer of any real or personal property specifically devised by the ward, who was competent at the time when he made the will but was incompetent at the time of the sale or transfer and never regained competency, so that the devised property is not contained in the estate at the time of the ward's death, the devisee may at his option take the value of the property at the time of the ward's death with the incidents of a general devise, or the proceeds thereof with the incidents of a specific devise.

Comment. Cf. 53 & 54 Vict., c. 5, § 123(1); N.Y. Civ. Prac. Act, § 1402; Ky. Rev. Stat. (1944) § 394.360. The Kentucky statute purports to give the value of any adeemed devise to the devisee if he is an heir of the testator. The Model Probate Code does not deal with this more general proposition but proceeds upon the theory that the remedy for the usual ademption situation lies in greater liberality by the courts in holding that devises are general or demonstrative rather than specific. See Introduction to this Code under "Omitted Matters." When the testator becomes incompetent, however, it seems unfair that acts of his guardian should work an ademption when the incompetent has no opportunity to remedy the situation by making a fresh will. The option given to the devisee in the above situation will prevent him from being totally disappointed in most cases where there are assets payable to devisees. If he chooses to take the value of the property the devise will abate as a general devise; if he can trace the proceeds and chooses to do so the devise will abate as a specific devise. As to abatement generally, see § 184.

§ 232. Compensation of guardian and attorney. A guardian shall be allowed such compensation for his services as guardian, as the court shall deem just and reasonable. Additional compensation may be allowed for his necessary services as attorney and for other necessary services not required of a guardian. He may also be allowed compensation for necessary expenses in the administration of his trust.

including reasonable attorney's fees if the employment of an attorney for the particular purpose is necessary. In all cases, compensation of the guardian and his expenses including attorney's fees shall be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or his attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian and for attorney's fees for services already performed. If the court finds that the guardian has failed to discharge his duties as such in any respect, it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

Comment. If it were desired to limit the guardian's ordinary compensation to a definite percentage of the income of the estate, the provisions of the Uniform Veterans' Guardianship Act (§ 249 of this Code) are suggestive. The limitations there provided might be enacted by rule of court. Compare § 103 as to compensation of the personal representative and his attorney. No attempt has been made in § 232 to permit a testator to limit the compensation of a guardian. The situations in a decedent's estate and an incompetent's estate are not analogous in this regard. It would seem to be against public policy in all cases to permit a testator to restrict a guardian's fees, as the selection of the guardian should be determined by the best interests of the living ward and in order to secure a proper guardian the court should not be limited by any fixed amount in the allowance of reasonable compensation to the guardian. The same considerations seem to indicate the desirability of not fixing any definite statutory limitation as to amount of the guardian's compensation.

§ 233. Accounting.

(a) **Guardian to account.** Unless otherwise directed by the court, every guardian of the estate shall file with the court annually within thirty days after the anniversary date of his appointment, and also within thirty days after termination of his appointment, a written verified account of his administration. Notice of hearing of every accounting shall be given to the same persons and in the same manner as is required by sec-

tion 207 hereof for notice of the petition for the appointment of a guardian. The account shall show with respect to each item for which credit is claimed whether or not the amount has been paid, and in either event the court may allow any item or disallow it in whole or in part except to the extent that it has been approved in advance.

(b) Effect of settlement. When notice has been given as provided in subsection (a), the settlement by the court of any account, subject to the right of appeal and to the power of the court to vacate its final orders, is binding upon all persons except the ward, or, if he shall die after the settlement, his personal representative. The ward, or, if he shall die after the settlement, his personal representative, may question any item of any settlement within two years after the date of the discharge of the guardian but not afterward.

(c) When decedents' estate law applicable. The provisions of sections 172, 174 to 178 inclusive, 180 and 181 hereof as to accounting in decedents' estates shall apply to guardianship estates.

Comment. Of particular importance under subsection (c) is the provision of § 175 that the court may provide for inspection of the balance of assets on hand. This device is more important in guardianship estates than in decedents' estates since the former normally continue over a longer period. See in this connection the provision of the Uniform Veterans' Guardianship Act (§ 247 of this Code) which requires inspection at each accounting.

In only a few states do the statutes provide specifically as to the conclusiveness of the annual or intermediate accounts of guardians. Some statutes provide for approval of such accounts which may be had ex parte and for judicial settlement of the final account. Statutes of this type and most other legislation on the subject are generally construed to permit re-examination of intermediate accounts upon the final account though the case law is more evenly divided as to whether the guardian may later question items of his intermediate accounts. Annotation, 99 A.L.R. 996. In the above section the position is taken that while notice to other interested persons is required in the case of annual accountings so as to bind them, the approval is not binding

on the ward until he becomes sui juris. See Pa. Stat. Ann. (Purdon, 1930) t. 50, § 962; Wash. Rev. Stat. (Supp. 1943) § 1575-1. Indeed, not even the settlement of the final account is binding on the ward until two years after the guardian's discharge.

§ 234. Termination of guardianship.

(a) **Termination without court order.** A guardianship is terminated

- (1) If the guardianship was solely because of the ward's minority, by the ward attaining his majority;
- (2) If the guardianship of the person was solely because of the ward's minority, by the marriage of the ward;
- (3) By an adjudication of competency of the ward;
- (4) By the death of the ward.

(b) **Termination on court order.** A guardianship may be terminated by court order after such notice as the court may require

- (1) If the guardianship is of the estate and the estate is exhausted;
- (2) If the guardianship is no longer necessary for any other reason.

(c) **Effect of termination.** When a guardianship terminates otherwise than by the death of the ward, the powers of the guardian cease, except that a guardian of the estate may make disbursements for claims that are or may be allowed by the court, for liabilities already properly incurred for the estate or for the ward, and for expenses of administration. When a guardianship terminates by death of the ward, the guardian of the estate may proceed under section 235 hereof but the rights of all creditors against the ward's estate shall be determined by the law of decedents' estates.

Comment. The particular appointment also terminates when the guardian is removed under § 216, or his resignation is accepted under § 217, though it will usually be necessary to appoint a new guardian.

§ 235. **Administration of deceased ward's estate.** Upon the death of a ward intestate the guardian of his estate has power under the letters issued to him and subject to the direction of the court to administer the estate as the estate of the deceased ward without further letters unless within thirty days after death of the ward a petition is filed for letters of administration or for letters testamentary and the petition is granted. Notice to creditors and other persons interested in the estate shall be published and may be combined with the notice of the guardian's final account. This notice shall be published in accordance with section 14(b)(2) hereof, and all claims which are not filed within sixty days after first publication shall be barred against the estate. Upon the hearing, the account may be allowed and the balance distributed to the persons entitled thereto, after the payment of such claims as may be allowed. Liability on the guardian's bond shall continue and shall apply to the complete administration of the estate of the deceased ward. If letters of administration or letters testamentary are granted upon petition filed within thirty days after the death of the ward, the administrator or executor shall supersede the guardian in the administration of the estate and the provisions of Part III of this Code shall apply to all proceedings in the administration, including the publication of notice to creditors and other interested persons and the barring of creditors' claims.

Comment. Cf. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 476; Ind. Stat. (Burns, 1933) § 8-135; Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 872. Upon death of a ward the rights of his creditors are determined according to the law of decedents' estates. See the last sentence of § 234(c) hereof. The shortening of the nonclaim period under § 235 is justified inasmuch as the guardian's personal liability remains for obligations incurred by him, and in normal cases other debts of the ward would probably have been already satisfied. It should not be necessary under this section that there be a separate hearing or notice of hearing on the final account of the guardian as to the post-mortem affairs of the ward. This section contemplates that

ordinarily all matters will be closed upon a single hearing, winding up both the guardianship and also the estate of the deceased ward as a decedent's estate. As to the application of the provisions of Part III in proceedings under § 235, see § 198 and second paragraph of comment thereto.

§ 236. Discharge of guardian. When a guardian of the estate shall file with the court proper receipts or other evidence satisfactory to the court, showing that he has delivered to the persons entitled thereto all the property for which he is accountable as guardian, the court shall enter an order of discharge. The discharge so obtained shall operate as a release from the duties of his office which have not theretofore terminated, and shall operate as a bar to any suit against the guardian and his sureties unless such suit be commenced within two years from the date of the discharge.

Comment. This section is designed to correspond to § 193 on discharge of personal representative.

As in case of personal representatives the discharge of the fiduciary terminates his powers and duties as to future acts. It does not, however, relieve him or his sureties from liability for past acts.

§ 237. Dispensing with guardianship.

(a) **Estate of minor of a value not exceeding five hundred dollars.** When the whole estate of a minor does not exceed the value of \$500, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize:

- (1) The deposit thereof in a depository authorized to receive fiduciary funds, payable to the guardian of the estate when appointed or to the minor upon his attaining the age of majority; or,
- (2) If the assets do not consist of money, the delivery thereof to a suitable person designated by the court, deliverable to the guardian of the estate when appointed or to the minor upon his attaining the age of majority; or,

- (3) The payment or delivery thereof to the parent of the minor, or to the person having the care or custody of the minor or to the minor himself.

The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct.

(b) Estate of adult incompetent of a value not exceeding five hundred dollars. When the whole estate of a person over the age of twenty-one who has been adjudicated incompetent does not exceed the value of \$500, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize the deposit thereof in a depository authorized to receive fiduciary funds in the name of a suitable person designated by the court, or if the assets do not consist of money, authorize the delivery thereof to a suitable person designated by the court. The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct.

(c) Deposit of funds subject to order of court. If the estate of an incompetent consists in money in an amount greater than \$500, and it is for the best interests of the incompetent that no guardian of the estate be appointed, and that such estate be deposited in a depository authorized to receive fiduciary funds, the court may, on reasonable notice to all persons who would be entitled to receive notice of a hearing on a petition to appoint a guardian, so order. The person receiving such money shall hold and dispose of the same in such manner as the court shall direct.

Comment. Subsections (a) and (b) are based on Ohio Gen. Code (Page, Supp. 1944) § 10507-5. If an incompetent's claim is pending in a court of ordinary trial jurisdiction, the legislation described in the comment to § 229 provides another means of dispensing with guardianship.

B. UNIFORM VETERANS' GUARDIANSHIP ACT

Comment to Part IV B. Sections 238 to 255 inclusive are §§ 1 to 18 inclusive of the 1942 Uniform Veterans' Guardianship Act, which

was a revision of a prior act promulgated by the National Conference of Commissioners on Uniform State Laws under the same title in 1928. The Commissioners' comments to the various sections have been omitted here. Almost two-thirds of the states have enacted the substance of either the 1928 or 1942 acts. As to the relation of Part IV B to Part IV A of this Code, see § 197 hereof and Introductory Comment to Part IV. Sections 19 to 24 of the uniform law are unnecessary if the uniform law is enacted as part of this Code. See §§ 2, 197 of this Code. In the first line of § 238 below, the words italicized should be substituted for the bracketed words, which were contained in the uniform act. Attention is called to the definitions contained in § 238, being § 1 of the uniform act, and in particular to the definition of "administrator."

§ 238. Definitions. As used in [this Act:] *Part IV B*:

"Person" means an individual, a partnership, corporation or an association.

"Veterans Administration" means the Veterans Administration, its predecessors or successors.

"Income" means moneys received from the Veterans Administration and revenue or profit from any property wholly or partially acquired therewith.

"Estate" means income on hand and assets acquired partially or wholly with "income."

"Benefits" means all moneys paid or payable by the United States through the Veterans Administration.

"Administrator" means the Administrator of Veterans Affairs of the United States or his successor.

"Ward" means a beneficiary of the Veterans Administration.

"Guardian" means any fiduciary for the person or estate of a ward.

§ 239. Administrator as party in interest. The Administrator shall be a party in interest in any proceeding for the appointment or removal of a guardian or for the removal of the disability of minority or mental incapacity of a ward, and in any suit or other proceeding affecting in any manner the ad-

ministration by the guardian of the estate of any present or former ward whose estate includes assets derived in whole or in part from benefits heretofore or hereafter paid by the Veterans Administration. Not less than 15 days prior to hearing in such matter notice in writing of the time and place thereof shall be given by mail (unless waived in writing) to the office of the Veterans Administration having jurisdiction over the area in which any such suit or any such proceeding is pending.

§ 240. Application. Whenever, pursuant to any law of the United States or regulation of the Veterans Administration, it is necessary, prior to payment of benefits, that a guardian be appointed, the appointment may be made in the manner hereinafter provided.

§ 241. Limitation on number of wards. No person other than a bank or trust company shall be guardian of more than five wards at one time, unless all the wards are members of one family. Upon presentation of a petition by an attorney of the Veterans Administration or other interested person, alleging that a guardian is acting in a fiduciary capacity for more than five wards as herein provided and requesting his discharge for that reason, the court, upon proof substantiating the petition, shall require a final accounting forthwith from such guardian and shall discharge him from guardianships in excess of five and forthwith appoint a successor.

§ 242. Appointment of guardians.

(a) A petition for the appointment of a guardian may be filed by any relative or friend of the ward or by any person who is authorized by law to file such a petition. If there is no person so authorized or if the person so authorized refuses or fails to file such a petition within thirty days after mailing of notice by the Veterans Administration to the last known address of the person, if any, indicating the necessity for the same, a peti-

tion for appointment may be filed by any resident of this state.

(b) The petition for appointment shall set forth the name, age, place of residence of the ward, the name and place of residence of the nearest relative, if known, and the fact that the ward is entitled to receive benefits payable by or through the Veterans Administration and shall set forth the amount of moneys then due and the amount of probable future payments.

(c) The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward and the name, age, relationship, if any, occupation and address of the proposed guardian and if the nominee is a natural person, the number of wards for whom the nominee is presently acting as guardian. Notwithstanding any law as to priority of persons entitled to appointment, or the nomination in the petition, the court may appoint some other individual or a bank or trust company as guardian, if the court determines it is for the best interest of the ward.

(d) In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent by the Veterans Administration on examination in accordance with the laws and regulations governing the Veterans Administration.

§ 243. Evidence of necessity for guardian of infant.

Where a petition is filed for the appointment of a guardian for a minor, a certificate of the Administrator or his authorized representative, setting forth the age of such minor as shown by the records of the Veterans Administration and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Veterans Administration shall be prima facie evidence of the necessity for such appointment.

§ 244. Evidence of necessity for guardian for incompetent. Where a petition is filed for the appointment of a guardian for a mentally incompetent ward, a certificate of the

Administrator or his duly authorized representative, that such person has been rated incompetent by the Veterans Administration on examination in accordance with the laws and regulations governing such Veterans Administration and that the appointment of a guardian is a condition precedent to the payment of any moneys due such ward by the Veterans Administration, shall be prima facie evidence of the necessity for such appointment.

§ 245. Notice. Upon the filing of a petition for the appointment of a guardian under this Act, notice shall be given to the ward, to such other persons, and in such manner as is provided by the general law of this state, and also to the Veterans Administration as provided by this Act.

§ 246. Bond.

(a) Upon the appointment of a guardian, he shall execute and file a bond to be approved by the court in an amount not less than the estimated value of the personal estate and anticipated income of the ward during the ensuing year. The bond shall be in the form and be conditioned as required of guardians appointed under the general guardianship laws of this state. The court may from time to time require the guardian to file an additional bond.

(b) Where a bond is tendered by a guardian with personal sureties, there shall be at least two such sureties and they shall file with the court a certificate under oath which shall describe the property owned, both real and personal, and shall state that each is worth the sum named in the bond as the penalty thereof over and above all his debts and liabilities and the aggregate of other bonds on which he is principal or surety and exclusive of property exempt from execution. The court may require additional security or may require a corporate surety bond, the premium thereon to be paid from the ward's estate.

§ 247. Petitions and accounts, notices and hearings.

(a) Every guardian, who has received or shall receive on account of his ward any moneys or other thing of value from the Veterans Administration shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys or other things of value so received by him, all earnings, interest or profits derived therefrom and all property acquired therewith and of all disbursements therefrom, and showing the balance thereof in his hands at the date of the account and how invested.

(b) The guardian, at the time of filing any account, shall exhibit all securities or investments held by him to an officer of the bank or other depository wherein said securities or investments are held for safekeeping or to an authorized representative of the corporation which is surety on his bond, or to the judge or clerk of a court of record in this state, or, upon request of the guardian or other interested party, to any other reputable person designated by the court, who shall certify in writing that he has examined the securities or investments and identified them with those described in the account, and shall note any omissions or discrepancies. If the depository is the guardian, the certifying officer shall not be the officer verifying the account. The guardian may exhibit the securities or investments to the judge of the court, who shall endorse on the account and copy thereof a certificate that the securities or investments shown therein as held by the guardian were each in fact exhibited to him and that those exhibited to him were the same as those shown in the account, and noting any omission or discrepancy. That certificate and the certificate of an official of the bank in which are deposited any funds for which the guardian is accountable, showing the amount on deposit, shall be prepared and signed in duplicate and one of each shall be filed by the guardian with his account.

(c) At the time of filing in the court any account, a certified copy thereof and a signed duplicate of each certificate filed with the court shall be sent by the guardian to the office of the Veterans Administration having jurisdiction over the area in which the court is located. A signed duplicate or a certified copy of any petition, motion or other pleading, pertaining to an account, or to any matter other than an account, and which is filed in the guardianship proceedings or in any proceeding for the purpose of removing the disability of minority or mental incapacity, shall be furnished by the person filing the same to the proper office of the Veterans Administration. Unless hearing be waived in writing by the attorney of the Veterans Administration, and by all other persons, if any, entitled to notice, the court shall fix a time and place for the hearing on the account, petition, motion or other pleading not less than fifteen days nor more than thirty days from the date same is filed, unless a different available date be stipulated in writing. Unless waived in writing, written notice of the time and place of hearing shall be given the Veterans Administration office concerned and the guardian and any others entitled to notice not less than 15 days prior to the date fixed for the hearing. The notice may be given by mail in which event it shall be deposited in the mails not less than 15 days prior to said date. The court, or clerk thereof, shall mail to said Veterans Administration office a copy of each order entered in any guardianship proceeding wherein the Administrator is an interested party.

(d) If the guardian is accountable for property derived from sources other than the Veterans Administration, he shall be accountable as is or may be required under the applicable law of this state pertaining to the property of minors or persons of unsound mind who are not beneficiaries of the Veterans Administration, and as to such other property shall be entitled to the compensation provided by such law. The account for other property may be combined with the account filed in accordance with this section.

§ 247. Petitions and accounts, notices and hearings
(alternative section).

(a) Every guardian, who has received or shall receive on account of his ward any money or other thing of value from the Veterans Administration, at the expiration of one year from date of his appointment, and every three years thereafter on the anniversary date of his appointment, or as much oftener as the court may require, shall file with the court a full true and accurate account under oath of all moneys or other thing of value received by him, all earnings, interest or profits derived therefrom, and all property acquired therewith and of all disbursements therefrom, and showing the balance thereof in his hands at the date of the account and how invested. Each year when not required to file an account with the court, the guardian shall file an account with the proper office of the Veterans Administration. If the interim account be not filed with the Veterans Administration, or, if filed, shall be unsatisfactory, the court shall upon receipt of notice thereof from the Veterans Administration require the guardian forthwith to file an account which shall be subject in all respects to the next succeeding paragraphs. Any account filed with the Veterans Administration and approved by the Chief Attorney thereof may be filed with the court and be approved by the court without hearing, unless a hearing thereon be requested by some party in interest.

(b) The guardian, at the time of filing any account with the court or Veterans Administration shall exhibit all securities or investments held by him to an officer of the bank or other depository wherein said securities or investments are held for safekeeping or to an authorized representative of the corporation which is surety on his bond, or to the judge or clerk of a court of record in this state, or upon request of the guardian or other interested party, to any other reputable person designated by the court, who shall certify in writing that he has examined the securities or investments and identified them

with those described in the account and shall note any omission or discrepancies. If the depository is the guardian, the certifying officer shall not be the officer verifying the account. The guardian may exhibit the securities or investments to the judge of the court, who shall endorse on the account and copy thereof, a certificate that the securities or investments shown therein as held by the guardian were each in fact exhibited to him and that those exhibited to him were the same as those in the account and noting any omission or discrepancy. The certificate, and the certificate of an official of the bank in which are deposited any funds for which the guardian is accountable, showing the amount on deposit, shall be prepared and signed in duplicate and one of each shall be filed by the guardian with his account.

(c) At the time of filing in the court any account, a certified copy thereof and a signed duplicate of each certificate filed with the court shall be sent by the guardian to the office of the Veterans Administration having jurisdiction over the area in which such court is located. A duplicate signed copy or a certified copy of any petition, motion or other pleading pertaining to an account, or to any matter other than an account, and which is filed in the guardianship proceedings or in any proceedings for the purpose of removing the disability of minority or mental incapacity, shall be furnished by the persons filing the same to the proper office of the Veterans Administration. Unless hearing be waived in writing by the attorney of the Veterans Administration and by all other persons, if any, entitled to notice, the court shall fix a time and place for the hearing on the account, petition, motion or other pleading, not less than fifteen days nor more than thirty days from the date same is filed, unless a different available date be stipulated in writing. Unless waived in writing, written notice of the time and place of hearing shall be given the Veterans Administration office concerned and to the guardian and any others entitled

to notice, not less than fifteen days prior to the date fixed for the hearing. The notice may be given by mail, in which event it shall be deposited in the mails not less than fifteen days prior to said date. The court or clerk thereof, shall mail to said Veterans Administration office a copy of each order entered in any guardianship proceeding wherein the Administrator is an interested party.

(d) If the guardian is accountable for property derived from sources other than the Veterans Administration, he shall be accountable as is or may be required under the applicable law of this state pertaining to the property of minors or persons of unsound mind who are not beneficiaries of the Veterans Administration, and as to such other property shall be entitled to the compensation provided by such law. The account for other property may be combined with the account filed in accordance with this section.

§ 248. Penalty for failure to account. If any guardian shall fail to file with the court any account as required by this Act, or by an order of the court, when any account is due or within thirty days after citation issues as provided by law, or shall fail to furnish the Veterans Administration a true copy of any account, petition or pleading as required by this Act, such failure may in the discretion of the court be ground for his removal.

§ 249. Compensation of guardians. Compensation payable to guardians shall be based upon services rendered and shall not exceed 5% of the amount of moneys received during the period covered by the account. In the event of extraordinary services by any guardian, the court, upon petition and hearing thereon may authorize reasonable additional compensation therefor. A copy of the petition and notice of hearing thereon shall be given the proper office of the Veterans Administration in the manner provided in the case of hearing

on a guardian's account or other pleading. No commission or compensation shall be allowed on the moneys or other assets received from a prior guardian nor upon the amount received from liquidation of loans or other investments.

§ 250. Investments. Every guardian shall invest the surplus funds of his ward's estate in such securities or property as authorized under the laws of this state but only upon prior order of the court; except that the funds may be invested, without prior court authorization, in direct unconditional interest-bearing obligations of this state or of the United States and in obligations the interest and principal of which are unconditionally guaranteed by the United States. A signed duplicate or certified copy of the petition for authority to invest shall be furnished the proper office of the Veterans Administration, and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account.

§ 251. Maintenance and support. A guardian shall not apply any portion of the income or the estate for the support or maintenance of any person other than the ward, the spouse and the minor children of the ward, except upon petition to and prior order of the court after a hearing. A signed duplicate or certified copy of said petition shall be furnished the proper office of the Veterans Administration and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account or other pleading.

§ 252. Purchase of home for ward.

(a) The court may authorize the purchase of the entire fee simple title to real estate in this state in which the guardian has no interest, but only as a home for the ward, or to protect his interest, or (if he is not a minor) as a home for his dependent family. Such purchase of real estate shall not be made except upon the entry of an order of the court after hearing

upon verified petition. A copy of the petition shall be furnished the proper office of the Veterans Administration and notice of hearing thereon shall be given said office as provided in the case of hearing on a guardian's account.

(b) Before authorizing such investment the court shall require written evidence of value and of title and of the advisability of acquiring such real estate. Title shall be taken in the ward's name. This section does not limit the right of the guardian on behalf of his ward to bid and to become the purchaser of real estate at a sale thereof pursuant to decree of foreclosure of lien held by or for the ward, or at a trustee's sale, to protect the ward's right in the property so foreclosed or sold; nor does it limit the right of the guardian, if such be necessary to protect the ward's interest and upon prior order of the court in which the guardianship is pending, to agree with co-tenants of the ward for a partition in kind, or to purchase from co-tenants the entire undivided interests held by them, or to bid and purchase the same at a sale under a partition decree, or to compromise adverse claims of title to the ward's realty.

§ 253. Copies of public records to be furnished. When a copy of any public record is required by the Veterans Administration to be used in determining the eligibility of any person to participate in benefits made available by the Veterans Administration, the official custodian of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the authorized representative of the Veterans Administration with a certified copy of such record.

§ 254. Discharge of guardian and release of sureties. In addition to any other provisions of law relating to judicial restoration and discharge of guardian, a certificate by the Veterans Administration showing that a minor ward has attained

majority, or that an incompetent ward has been rated competent by the Veterans Administration upon examination in accordance with law shall be prima facie evidence that the ward has attained majority, or has recovered his competency. Upon hearing after notice as provided by this Act and the determination by the court that the ward has attained majority or has recovered his competency, an order shall be entered to that effect, and the guardian shall file a final account. Upon hearing after notice to the former ward and to the Veterans Administration as in case of other accounts, upon approval of the final account, and upon delivery to the ward of the assets due him from the guardian, the guardian shall be discharged and his sureties released.

§ 255. Commitment to Veterans Administration or other agency of United States Government.

(a) Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans Administration or other agency of the United States Government, the court, upon receipt of a certificate from the Veterans Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this Act shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated

by any such agency within or without this state shall be subject to the rules and regulations of the Veterans Administration or other agency. The Chief Officer of any facility of the Veterans Administration or institution operated by any other agency of the United States to which the person is so committed shall with respect to such person be vested with the same powers as superintendents of state hospitals for mental diseases within this state with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this state at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this Act are so conditioned.

(b) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans Administration, or other agency of the United States Government for care or treatment shall have the same force and effect as to the committed person while in this state as in the jurisdiction in which is situated the court entering the judgment or making the order; (and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint; as is provided in subsection (a) of this section with respect to persons committed by the courts of this state. Consent is hereby given to the application of the law of the committing state or District in respect to the authority of the chief officer of any facility of the Veterans Administration, or of any institution operated in this state by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.)

(c) Upon receipt of a certificate of the Veterans Administration or such other agency of the United States that facilities are available for the care or treatment of any person here-

tofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans Administration or other agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans Administration or other agency of the United States pursuant to the original commitment.

PART V. ANCILLARY ADMINISTRATION

INTRODUCTORY COMMENT

This part of the Code consists of acts promulgated or to be promulgated by the National Conference of Commissioners on Uniform State Laws. Sections 256 to 260 inclusive are sections 1 to 5 of the Uniform Powers of Foreign Representatives Act, promulgated in 1944. The remaining sections of this uniform act are merely formal and are unnecessary when the act is incorporated into a probate code. The Commissioners' notes are omitted. The basic philosophy of the uniform act is that if the domicile of the decedent or ward is in another jurisdiction the domiciliary personal representative or guardian is given the full powers of a local personal representative or guardian if there is no administration granted in the local jurisdiction. Various drafts of the act, together with the Commissioners' notes and other

materials are found in the Handbooks of the National Conference commencing in 1940. In the first line of § 256 below, the words italicized should be substituted for the bracketed words, which were contained in the uniform act. It should be noted that in §§ 256 to 260 the term "representative" includes guardians and testamentary trustees and should be distinguished from the term "personal representative" as used in Parts I to IV of this Code. "Representative," as used in the act and this part of the Model Probate Code, has the same meaning as "fiduciary" elsewhere in the Code. See § 3(i) hereof.

The companion act, the Uniform Ancillary Administration of Estates Act, has not yet been promulgated by the National Conference. The latest draft was considered by the Conference in 1944. Earlier drafts are contained in the Handbooks of the Conference for 1941 to 1943. This act will provide for the situations where the local jurisdiction grants ancillary administration. The basic philosophy is to unify the domiciliary and ancillary administrations in so far as it is possible to do so. Thus, the drafts contemplate that the domiciliary personal representative or guardian may act as ancillary representative and preference is given for his appointment. After setting up the procedure peculiar to ancillary administration, § 15 of the 1944 draft declares that the general law relative to administration applies to ancillary administration. Cf. § 198 of this Code. In the drafts of the Uniform Ancillary Administration of Estates Act, § 1, the definitional section, is identical with § 1 of the Uniform Powers of Foreign Representatives Act. Hence § 256 below can be declared to apply also to the sections which are taken from the Uniform Ancillary Administration of Estates Act when the latter is promulgated.

In 1915 the National Conference promulgated the Uniform Wills Act, Foreign Probated which has been enacted in five states. However, this act was withdrawn by the Conference in 1943. Undoubtedly this action was due in part to the fact that the act required proof of execution of the will and did not accept the foreign probate as proof of that fact. As to this general problem, see Hopkins, "The Extraterritorial Effect of Probate Decrees," 53 Yale L. J. 221 (1944); Carey, "A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedents' Estates," 24 Ill. L. Rev. 44, 170 (1929). It is expected that the National Conference will undertake the preparation of a new uniform act on this subject. When this has been done, the three uniform acts will complete the matters upon ancillary probate and administration necessary for inclusion in a probate code. Among the better existing statutes on the subject of probate of foreign wills are: Cal. Prob. Code

Ann. (Deering, 1944) §§ 360 to 362; Mass. Ann. Laws (1932) c. 192, §§ 9 to 11; Minn. Stat. (1941) §§ 525.27 to 525.273; Ohio Gen. Code (Page, 1937) §§ 10511-5 to 10511-9.

UNIFORM POWERS OF FOREIGN REPRESENTATIVES ACT

§ 256. Definitions. As used in [this Act:] *sections 255 to 260:*

- (a) "Representative" means an executor, administrator, testamentary trustee, guardian or other fiduciary of the estate of a decedent or a ward, duly appointed by a court and qualified. It includes any corporation so appointed, regardless of whether the corporation is eligible to act under the law of this state. This Act does not change the powers or duties of a testamentary trustee under the non-statutory law or under the terms of a trust.
- (b) "Foreign representative" means any representative who has been appointed by the court of another jurisdiction in which the decedent was domiciled at the time of his death, or in which the ward is domiciled, and who has not also been appointed by a court of this state.
- (c) "Local representative" means any representative appointed as ancillary representative by a court of this state who has not been appointed by the domiciliary court.
- (d) "Local and foreign representative" means any representative appointed by both the domiciliary court and by a court of this state.

§ 257. Powers of foreign representatives in general. When there is no administration or application therefor pending in this state, a foreign representative may exercise all powers which would exist in favor of a local representative,

and may maintain actions and proceedings in this state subject to the conditions imposed upon non-resident suitors generally.

§ 258. Proof of authority in court proceedings; bond.

Upon commencing any action or proceeding in any court of this state, the foreign representative shall file with the court authenticated copies of his appointment, and of his official bond if he has given a bond. If the court believes that the security furnished by him in the domiciliary administration is insufficient to cover the proceeds of the action or proceeding, it may at any time order the action or proceeding stayed until sufficient security is furnished in the domiciliary administration.

§ 259. Proceedings to bar creditors' claims. Upon application by a foreign representative to the [probate] court of the county in which property of the decedent or of the ward is located, the court shall cause notice of the appointment of the foreign representative to be published once in each of [three] consecutive weeks in some newspaper of general circulation in the county. The claims of all creditors of the decedent or of the ward, unless filed with the court within [] after date of the first publication are barred as a lien upon all property of the decedent or of the ward in this state, to the extent that claims are barred by a local administration. If before the expiration of such period any claims have been filed and remain unpaid after reasonable notice thereof to the foreign representative, ancillary administration may be had.

§ 260. Effect of local proceedings. The powers granted by this Act shall be exercised only when there is no administration or application therefor pending in this state, except to the extent that the court granting local letters may order otherwise, but no person who, before receiving actual notice of local administration or application therefor, has changed his position by relying on the powers granted by this Act shall be prej-

udiced by reason of the application for, or grant of, local administration. The local representative or the local and foreign representative shall be subject to all burdens which have accrued by virtue of the exercise of the powers, or otherwise, under this Act and may be substituted for the foreign representative in any action or proceeding in this state.

UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT

(To be promulgated by the National Conference of Commissioners on Uniform State Laws. See Introductory Comment to Part V.)

UNIFORM WILLS ACT, FOREIGN PROBATED

(To be prepared by the National Conference of Commissioners on Uniform State Laws. The Act of 1915 promulgated under this title has been withdrawn by the National Conference. See Introductory Comment to Part V.)

PART TWO
APPENDICES TO
MODEL PROBATE CODE

APPENDIX A

Statutory Notes on Various Sections of the Model Probate Code

IN connection with the preparation of the Model Probate Code, many memoranda on particular topics were prepared for the use of the draftsmen. In some instances the substance of them was embodied in comments which appear in connection with the pertinent sections of the Code. Sometimes, however, either by reason of their length or their subject matter, they were not suitable for comments; and were, therefore, preserved in this Appendix. These notes are primarily statutory, though in some instances they include citations of case law. They were prepared as a part of the research work of the University of Michigan Law School under the supervision of Professor Lewis M. Simes. Most of them were written by Miss Elizabeth Durfee, research assistant of the University of Michigan Law School. While not a part of the report of the Committee on Model Probate Code, they throw much light on portions of that report.

§ 20. APPEALS

WITH PARTICULAR REFERENCE TO DECEDENTS' ESTATES

Though all the states have statutory provisions for appeals, there is considerable variation in the details of these statutes. Some permit appeals from any decision of the probate court, while others list specific appealable orders. In some states the appeal is a trial de novo, in others it is in the nature of a law appeal, and in still others it is like an equity appeal. Perhaps the point of greatest difference in the various states is in the time for appeal. All of these matters will be discussed in this note. In general, see 2 Woerner, Administration (3d ed., 1923) §§ 542-550.

1. *What orders may be appealed.* In most states an appeal is permitted in general terms from all final orders, or from "any order" or "any decision" or by similar terms it is indicated that most orders are appealable. The statutory language varies somewhat, and will be set out for each state. Seven of the states in this group—Georgia, Indiana, Nebraska, New Jersey, New Mexico, North Carolina and Tennessee—also provide specifically for appeals from certain orders, but inasmuch as these orders would seem to be included in the general provisions it has not seemed necessary to set out the special ones here. In two states, Maine and Michigan, the statement that any order is appealable is followed by a list of specific exceptions. In fourteen other states the statute is of a different type, and lists specifically the decrees and orders which may be appealed, either in one comprehensive section or in scattered provisions throughout the probate statutes. The following list indicates what orders and decisions may be appealed in each jurisdiction.

Ala. Code (1940) t. 7, § 775. "From any final decree of the court of probate, or from any final judgment, order or decree of the judge of probate."

Ariz. Code (1939) § 21-1702, subd. 3. Appealable orders are listed specifically.

Ark. Laws 1939, act 164, p. 388 (appears also in Dig. Stat. (Pope, Supp. 1944) p. 678) "Any final order or judgment."

Cal. Prob. Code Ann. (Deering, 1944) § 1240. Appealable orders are listed specifically.

Colo. Stat. (1935) c. 176, § 243. "Any and all final judgments, decrees or orders . . . entered upon any question of law or fact, or both."

Conn. Gen. Stat. (1930) § 4990. "Any order, denial or decree" unless otherwise provided by law.

Del. Rev. Code (1935) §§ 3827, 3835, 3843, 3866, 3894. Appealable orders are listed specifically.

D. C. Code (1940) § 17-101. "Any final order, judgment or decree."

Fla. Stat. Ann. (1941) § 732.15. "All orders, judgments and decrees of the county judge finally determining rights of any party."

Ga. Code Ann. (1936) § 6-201. "Any decision . . . except an order appointing a special administrator."

Idaho Laws Ann. (1943) § 11-401. Appealable orders are listed specifically.

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 483, 484. "A final order or decree . . . in a proceeding for the sale of real estate"; "any other order, judgment or decree."

Ind. Stat. (Burns, 1933) § 6-2001. "Any decision."

Iowa Rules Civ. Proc., Rule 331, in Laws 1945, p. 340. "All final judgments and decisions . . . and any final adjudication . . . involving the merits or materially affecting the final decision"; interlocutory orders under certain circumstances.

Kan. Gen. Stat. (Supp. 1943) § 59-2401. Appealable orders are listed specifically.

Ky. Rev. Stat. (1944) §§ 23.030, 394.240, 395.440. Appealable orders are listed specifically.

Me. Rev. Stat. (1944) c. 140, § 32. "Any order, sentence, decree or denial . . . except the appointment of a special administrator, or any order or decree requiring any administrator, guardian, or trustee to give an additional or new official bond, or any order or decree under the provisions of section 53 of chapter 141, [appointment of an executor instead of a special administrator pending an appeal from probate of a will], or any order or decree removing a guardian from office."

Md. Code (1939) art. 5, § 64. "All decrees, orders, decisions and judgments."

Mass. Ann. Laws (1932) c. 215, § 9. "An order, decree or denial."

Mich. Stat. Ann. (1943) §§ 27.3178(36), 27.3178(37). "Any order, sentence, decree or denial"; "no appeal shall lie from any order of the probate court removing any fiduciary for failure to give such new bond or render such account as may be required by order of such probate court in pursuance of law, nor from the appointment of special administrators or special guardians, nor from an order granting a rehearing, nor by any person, except the widow or children affected thereby, from an order granting an allowance to the widow

or children of a decedent pending settlement of the estate, nor from an order granting permission to sue on a fiduciary's bond."

Minn. Stat. (1941) § 525.71. Appealable orders are listed specifically.

Miss. Code (1942) §§ 1147, 1148. "Any final decree"; also any interlocutory decree in the discretion of the chancellor, when such decree orders money to be paid or the possession of property changed, or on demurrer, or in exceptional cases to avoid expense and delay.

Mo. Rev. Stat. Ann. (1942) § 283. Appealable orders are listed specifically.

Mont. Rev. Code (1935) § 9731 (amended Laws 1941, c. 41). Appealable orders are listed specifically.

Neb. Rev. Stat. (1943) § 30-1601. "Any final order, judgment or decree."

Nev. Comp. Laws (Supp. 1941) § 9882.293. Appealable orders are listed specifically.

N. H. Rev. Laws (1942) c. 365, § 1. "A decree, order, appointment, grant or denial . . . which may conclude his interest and which is not strictly interlocutory."

N. J. Rev. Stat. (1937) §§ 2:31-90, 2:31-92, 2:31-93, 3:2-52. Orders respecting probate of wills, inventory or grant of letters of administration or guardianship may be appealed from surrogate to orphans court; all other proceedings of a surrogate are appealable to the prerogative court; "order or decree" of orphans court is appealable to prerogative court.

N. M. Stat. (1941) § 16-418. "Any decision."

N. Y. Surr. Ct. Act, § 288. "A decree of a surrogate's court, or from an order affecting a substantial right . . . in a special proceeding, or from an order of the supreme or a county court . . . granting or denying a motion for a new trial after a trial of controverted issues of fact pursuant to an order of the surrogate directing specified questions of fact to be so tried."

N. C. Gen. Stat. (1943) §§ 1-272, 7-66. "All matters of law or legal inference"; "all issues of law or fact."

N. D. Rev. Code (1943) § 30-2601. "A decree or any order affecting a substantial right."

Ohio Gen. Code (Page, Supp. 1944) § 10501-56. "Any order, decision or judgment."

Okla. Stat. (1941) t. 58, § 721. Appealable orders are listed specifically.

Ore. Comp. Laws (1940) § 10-801. "A judgment or decree . . . an order affecting a substantial right."

Pa. Stat. Ann. (Purdon, 1930) t. 20, §§ 2253, 2601. "Orders or decrees" of the register; "the definitive sentence or decree" of the orphans court.

R. I. Gen. Laws (1938) c. 573, §§ 1, 19. "An order or decree"; no appeal from an order giving advice and direction.

S. C. Code (1942) § 230. "Any final order, sentence or decree."

S. D. Code (1939) § 35.2101. Appealable orders are listed specifically.

Tenn. Code (Michie, 1938) § 9028. "The sentence, judgment, or decree."

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3698. "Any decision, order, decree or judgment."

Utah Code (1943) § 20-2-2. "All final orders and decrees."

Vt. Pub. Laws (1933) §§ 3001, 3005. "An order, sentence, decree or denial."

Va. Code (Michie, 1942 and Supp. 1944) §§ 5429, 6336. Appealable orders are listed specifically.

Wash. Rev. Stat. (1932) § 1591. "Any final order, judgment or decree."

W. Va. Code (1943) §§ 4067, 4088, 4165, 4180, 5761. Appealable orders are listed specifically.

Wis. Stat. (1943) § 324.01. "Any order or judgment."

Wyo. Rev. Stat. (1931) § 88-911. "Any final order."

It is noteworthy that four of the fourteen states whose statutes list appealable orders specifically (Kansas, Missouri, Oklahoma and South Dakota) conclude their list with a catch-all permitting appeal from any other final decision not listed. In view of this broad provision it would seem useless to list certain appealable orders in detail. In the absence of such a catch-all clause, the type of statute which specifies appealable orders presents certain problems, the most obvious of which is the unintentional omission. Thus, the Idaho statute formerly pro-

vided for an appeal (inter alia) from an order "granting, refusing or revoking" letters of a personal representative, and "against or in favor of the validity of a will, or revoking the probate thereof." It was found necessary to amend these provisions so as to include orders *refusing* to revoke letters of probate. Moreover, in several states the section listing appealable orders is not complete, so that it is necessary to search other parts of the statute book in order to discover whether an appeal may be had in particular cases. Thus in Oklahoma, there are separate sections providing for an appeal in escheat proceedings and proceedings for determination of heirship, and in West Virginia there are four isolated sections covering particular appeals in addition to the general section on appeals. While this objection is one of inconvenience only, it may be avoided by the use of the more common type of statute providing for appeals from all final orders.

A few states provide explicitly that no appeal will lie from the appointment of a special administrator. These are Ariz. Code (1939) § 38-602; Cal. Prob. Code Ann. (Deering, 1944) § 461; Ga. Code Ann. (1936) §§ 6-201, 113-1207; Idaho Laws Ann. (1943) § 15-354; Kan. Gen. Stat. (Supp. 1943) § 59-2401; Me. Rev. Stat. (1944) c. 140, § 32; Mich. Stat. Ann. (1943) § 27.3178(37); Minn. Stat. (1941) § 525.30; Neb. Rev. Stat. (1943) § 30-317; Nev. Comp. Laws (Supp. 1941) § 9882.84; Okla. Stat. (1941) t. 58, § 213; S. D. Code (1939) § 35.0603; Vt. Pub. Laws (1933) § 2796; Wis. Stat. (1943) § 311.06; and Wyo. Rev. Stat. (1931) § 88-1803. It should be noticed also that the other states which list specifically the appealable orders do not include the appointment of the special administrator; in those states, therefore, such an order is not appealable unless it falls within the provision for appeal from appointment of the personal representative. In this connection it may be mentioned that a few states specifically permit an appeal from the appointment of a special administrator, and provide that such appeal shall not prevent his continuing in the discharge of his duties. Iowa Code (1939) § 11885; Mass. Ann. Laws (1932) c. 193, § 10; N. H. Rev. Laws (1942) c. 352, § 24; but to the effect that the order appointing a special administrator is not a final judgment and therefore not appealable, see *In re Jones' Estate*, 56 Utah 291, 190 P. 783 (1920).

Beyond the prohibitions already listed, there are no express denials of the right of appeal, though it is limited in some instances, as for example in Alabama, where an order removing a personal representative may not be appealed unless he gives bond. Ala. Code (1940) t. 7, § 779.

2. *Nature of appeal.* In twenty-six states the appeal is a trial de novo. See Simes and Basye, "The Organization of the Probate Court in America," 42 Mich. L. Rev. 965 at 995 (1944), for a list of these states. In the other states the appeal is a true appeal. In some it is treated like a law appeal, so that the appellate court does not weigh the evidence but affirms the decision of the lower court if there is substantial evidence to support the findings of fact. In other states the appellate court weighs the evidence and makes its own findings of fact, in the nature of an equity appeal. In a few states it is expressly provided that the appellate court may hear testimony if it so desires, e.g., Cal. Code Civ. Proc. (Deering, 1941) § 956a. In many states it has been impossible to ascertain whether the appeal is in the nature of a law appeal or an equity appeal; the following list indicates its nature so far as it could be determined.

States in which the appeal is a law appeal:

Alabama. Rogers v. McLeskey, 225 Ala. 148, 142 So. 526 (1932); Patterson v. Murphy, 9 So. (2d) 754 (1942).

Florida. In re Thompson's Estate, 145 Fla. 42, 199 So. 352 (1940).

Iowa. Murphy v. Callan, 199 Iowa 216, 199 N.W. 981 (1925); In re Will of Fish, 220 Iowa 1247, 264 N.W. 123 (1935); In re Estate of Conkling, 221 Iowa 1332, 268 N.W. 67 (1936).

Ohio. In re Roeser's Estate (Ohio App., 1942) 47 N.E. (2d) 410.

Pennsylvania. Catalano's Estate, 309 Pa. 249, 163 A. 527 (1932); Pusey's Estate, 321 Pa. 248, 184 A. 844 (1936). (But apparently equity appeals are reviewed in the same way as law appeals. Naulty v. Stiteler, 341 Pa. 234, 19 A. (2d) 141 (1941); Lochinger v. Hanlon, 348 Pa. 29, 33 A. (2d) 1 (1943).)

South Carolina (probably). Ex parte Blizzard, 185 S.C. 131, 193 S.E. 633 (1937).

States in which the appeal is an equity appeal:

Arkansas. Constitution, Amendment 24; *Campbell v. Hammond*, 203 Ark. 130, 156 S.W. (2d) 75 (1941).

California. Code Civ. Proc. (Deering, 1941) § 956a.

Massachusetts. Ann. Laws (1932) c. 215, § 9; *Tuells v. Flint*, 283 Mass. 106, 186 N.E. 222 (1933) (but court indicates that the findings of the trial judge should be revised only if plainly wrong, and that they should be rarely reversed if they rest on open testimony). *Bowles v. Comstock*, 286 Mass. 159, 189 N.E. 785 (1934).

Mississippi. Chancery court deals with probate matters.

New Jersey. Prerogative Court Rules (1941 Revision) Rules 82, 100.

New York. Surr. Ct. Act § 309; *Matter of McMillan*, 218 N.Y. 64, 112 N.E. 573 (1916); *In re Baldwin's Will*, 216 App. Div. 111, 215 N.Y.S. 149 (1926), affirmed without opinion 243 N.Y. 646, 154 N.E. 641.

3. *Time for appeal.* The time for appeal varies from four days in Georgia to twelve months in Delaware. Several states give six months, while the majority have a shorter period, often thirty days or sixty days. A few states grant extensions in case of disabilities. The period for appeal in each jurisdiction is as follows:

Ala. Code (1940) t. 7, § 776. Varies from five days to six months depending on the decree which is appealed.

Ariz. Code (1939) § 21-1801. Sixty days.

Ark. Laws 1939, act 164, p. 388. Six months.

Cal. Code Civ. Proc. (Deering, 1941) § 939. Sixty days.

Colo. Stat. (1935) c. 46, § 166. Ten days.

Conn. Gen. Stat. (1930) § 4991. One month; or twelve months if the person had no notice and was not present; but appeal on payment of claims in insolvent estates, and those based on disqualification of the judge, must be within one month; period may be extended in case of disabilities.

Del. Rev. Code (1935) § 4419. One year for appeal from orphans court to superior court, with one year after removal of disabilities.

D.C. Rules of the U. S. Court of Appeals for the District of Columbia, in 11 U.S. S. Ct. Digest (Supp. 1945) Rule 10(a). Three months.

Fla. Stat. Ann. (1941) § 732.16. Thirty days.

Ga. Code Ann. (1936) § 6-202. Four days.

Idaho Laws Ann. (1943) § 11-404. Sixty days.

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 484. Twenty days; may be extended not to exceed sixty days.

Ind. Supreme Court Rule 2-2 in 1 Ind. Stat. (Burns, Supp. 1943). Ninety days; ninety days after removal of disability.

Iowa Rules Civ. Proc. Rule 335, in Laws 1943, c. 278. Thirty days.

Kan. Gen. Stat. (Supp. 1943) § 59-2404 (amended Laws 1945, c. 237). Thirty days; nine months from an order admitting, or refusing to admit a will to probate.

Ky. Civ. Code (1938) § 729. Sixty days. Ky. Rev. Stat. (1944) § 394.240 gives five years for appeal from probate or denial of probate.

Me. Rev. Stat. (1944) c. 140, § 32. Twenty days; if a person is beyond sea or out of the United States and without an attorney within the state, twenty days from his return or appointment of an attorney.

Md. Code (1939) art. 5, § 66. Thirty days.

Mass. Ann. Laws (1932) c. 215, § 9. Twenty days.

Mich. Stat. Ann. (1943) § 27.3178(36). Twenty days; may be extended not to exceed forty days beyond the twenty days.

Minn. Stat. (1941) § 525.712. Thirty days; or six months if there is no notice of the order, judgment or decree appealed from.

Miss. Code (1942) § 1148. Thirty days for interlocutory orders; nothing found on final orders.

Mo. Rev. Stat. Ann. (1942) § 285. During the term at which the decision is made, or within ten days thereafter; nonresident of the county has twenty days.

Mont. Rev. Code (1935) § 9732. Sixty days.

Neb. Rev. Stat. (1943) § 30-1602. Thirty days.

Nev. Comp. Laws (Supp. 1941) § 9385.60. Six months.

N. H. Rev. Laws (1942) c. 365, § 2. Sixty days.

N. J. Rev. Stat. (1937 and Supp. 1940) §§ 2:31-90, 3:2-52, 2:31-94. Twenty days for appeal from surrogate to orphans court from an order in proving an inventory or granting letters of administration or guardianship; three months for appeal from surrogate to orphans court re probate of a will, but six months for an appellant who

resided out of the state at the time of decedent's death; thirty days for appeals from orphans court to prerogative court.

N. M. Stat. (1941) § 16-418. Ninety days.

N. Y. Surr. Ct. Act, § 293. Thirty days.

N. C. Gen. Stat. (1943) §§ 1-272, 28-70, 28-162. Five days for appeal re discovery of assets; otherwise ten days.

N. D. Rev. Code (1943) § 30-2603. Thirty days.

Ohio Gen. Code (Page, Supp. 1945) § 12223-7. Twenty days for an appeal to the supreme court or court of appeals; otherwise ten days; may be extended for twenty days in case of death or insanity of a party.

Okla. Stat. (1941) t. 58, § 724. Ten days; or thirty days for a party who was not present.

Ore. Comp. Laws (Supp. 1943) § 10-803. Sixty days to supreme court; thirty days to circuit court.

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2601. Six months for appeal from orphans court. Nothing found on appeal from register.

R. I. Gen. Laws (1938) c. 573, § 1. Forty days.

S. C. Code (1942) § 230. Fifteen days.

S. D. Code (1939) § 35.2103. Thirty days.

Tenn. Code (Michie, 1938) § 9030. Next term if more than five days intervene; if less than five days, then the next succeeding term.

Tex. Civ. Stat. Ann. (Vernon, 1942) art. 932; Rules Civ. Proc. (Franki, 1942) Rule 332. Appeal bond is to be filed in fifteen days; certiorari lies within two years, with two years after removal of disabilities.

Utah Code (1943) § 104-41-2. Ninety days.

Vt. Pub. Laws (1933) § 3005. Twenty days.

Va. Code (1942) § 6337. Four months.

Wash. Supreme Court Rule V (1), in 1 Wash. Rev. Stat. (Supp. 1940). Thirty days.

W. Va. Code (1943) § 5764. Four months.

Wis. Stat. (1943) §§ 324.01, 324.04, 324.05. Sixty days; may be extended to one year if person aggrieved fails to appeal without fault on his part.

Wyo. Rev. Stat. (1931) § 89-4902. Ten days.

4. *One appeal to bring up all errors.* The normal procedure in decedents' estate proceedings requires an appeal from each "final" order made, with the result that there may be many appeals during the settlement of a single estate. There may, for instance, be an appeal from the probate of the will, the appointment of the personal representative, decisions on claims, accountings, the decree of final distribution, and perhaps other matters. The Model Probate Code formulates a method analogous to appeals in civil actions, so that errors saved by proper objections may be brought up together on appeal from the decree of final distribution. Although there are obvious differences between a probate proceeding and a civil action, they are not so essentially different that the same methods of appeal cannot be used in both types of proceeding. There are, however, certain decisions in the course of administration of an estate which are so fundamental to the whole proceeding that it is necessary to permit an appeal from them before continuing with the administration. The decision on the probate of the will and the appointment of the personal representative clearly form the basis upon which all other steps in the administration may depend, and therefore appeals on these matters should not be delayed. Other matters, however, will not so materially affect succeeding steps in the administration that a review of them is essential before the estate is fully administered.

An approach to this method of appeal is found in Alabama, where it is provided that either party to an appeal in probate matters may by a bill of exceptions reserve "any charge, opinion, ruling or decision . . . which would not otherwise appear of record." Ala. Code (1940) t. 7, § 783. And in New York each intermediate order which necessarily affects the decree appealed from may be included in the appeal. N. Y. Surr. Ct. Act, § 295. In addition, in two states whose probate business is handled by the court of general jurisdiction, the code of civil procedure governs probate appeals, and the rules permitting review of intermediate orders on appeal from final orders must necessarily apply to probate appeals as well as to appeals in civil actions. See Wash. Rev. Code (1932) §§ 1591, 1736; Wyo. Rev. Stat. (1931) § 88-911. It is not clear how far these rules bring about a substantial variation from the probate practice followed in most states.

§ 21. RECORDS

Provisions regarding the making and keeping of records in the probate court are found in all the states. While these provisions are commonly grouped together, in some states the pertinent sections are scattered throughout the probate statutes. In Missouri, for example, there are some ten or twelve scattered sections covering the subject. In general, it may be said that the purpose of making records is the preservation of documents and information. The filing of the various papers is sufficient preservation in some cases, but the danger of loss or intentional removal of such important documents as wills and bonds warrants their duplication by copying them into the court records.

Without attempting to list all the substantive provisions for recording found in the various states, a few of the more common requirements may be noted. All except two or three states require recording of probated wills, and almost as many require recording of letters and bonds. A less common requirement is the recording of the inventory and appraisal. Ill. Ann. Stat. (Smith-Hurd, 1941 and Supp. 1944) c. 3, §§ 323, 327; Mo. Rev. Stat. Ann. (1942) § 71. Recording of claims is a requirement in Kan. Gen. Stat. (Supp. 1943) § 59-212, and in Minn. Stat. (1941) § 525.03. It is commonly required that orders, decrees and judgments be recorded. Kan. Gen. Stat. (Supp. 1943) § 59-212; Mich. Stat. Ann. (1943) § 27.3178(28); Minn. Stat. (1941) § 525.03.

A given state may have few or many of these provisions. In California, for example, the only records required are records of probated wills and of orders and decrees. Cal. Prob. Code Ann. (Deering, 1944) §§ 332, 1221. In Florida, a record must be made of probated wills, letters, bonds, orders and judgments, and all other writings required to be recorded. A progress docket is also required, noting each pleading or document filed. An instrument settling an account of the personal representative may also be recorded. Fla. Stat. Ann. (1941) §§ 732.07, 733.48. The Kansas statute provides for a record of probated wills, elections filed, letters issued, certificates of appointment, bonds, orders, judgments and decrees, and such other documents as the court may determine. In addition, there is an appearance docket listing all documents filed, a claims docket, and various indexes. Kan. Gen. Stat. (Supp. 1943) § 59-212. In Michigan

records must be kept of orders, sentences, decrees, and all other official acts of the judge, and probated wills, letters and all other things proper to be recorded. Mich. Stat. Ann. (1943) § 27.3178(28).

§ 29. ADVANCEMENTS

In general on advancements, see Atkinson, Wills (1937) § 239; 3 Woerner, Administration (3d ed., 1923) 1879-1898; annotations in 26 A.L.R. 1178 and 76 A.L.R. 1420. Every state except New Mexico has legislation on the subject. In some states it is little more than an enunciation of the rule in general terms, while in other states the statute is detailed. There is one group of fourteen states whose statutes are almost identical, or include almost identical sections. This group consists of Alabama, California, Idaho, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah and Washington. The Wisconsin code also contains a few of the sections which appear in this group. There is also a close similarity between Virginia and West Virginia and between Maryland and the District of Columbia. There is some similarity, though less marked, between Colorado and Wyoming; between Arkansas and Indiana; and between Arizona, Mississippi, Missouri and Texas. Otherwise, there is little similarity as to form, but nearly all the statutes are alike as to substance.

1. *What donees are covered?* The statutes usually cover gifts to children; or to children and their issue; or to children and other lineal descendants. A few statutes refer simply to heirs, and in Florida the statute applies to gifts to "any person." In Nevada, one section speaks of "any donee" but the succeeding sections refer to "heirs." Twenty-six states provide that the representative of a deceased advancee will be treated as if the advancement were made to him, but two jurisdictions (District of Columbia and Maryland) provide the opposite. The other states are silent on this point. Eight states provide that bringing in the advancement does not increase the share of the surviving spouse, and perhaps North Carolina also provides thus. Georgia, on the other hand, stipulates that the spouse's share is thereby increased.

2. *Must the advancement be in writing?* California, Illinois, Maine, Nevada, and Oregon so provide. In addition, New Hampshire, Rhode Island and Vermont require a writing unless the gift was made

before two witnesses "who were requested to take notice thereof." (In New Hampshire also a deed expressed to be made for love or affection may be an advancement.) In several other states there is a statute which seems to require a writing, by a provision identical or nearly identical with the following Michigan statute: "All gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." Mich. Stat. Ann. (1943) § 27.3178(160). Similar language appears in Georgia, Idaho, Massachusetts, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wisconsin. This form of statute has been held to require a writing in *Olney v. Brown*, 163 Mich. 125, 128 N.W. 241 (1910); *Stark v. Stark*, 128 Neb. 524, 259 N.W. 523 (1935); *Arthur v. Arthur*, 143 Wis. 126, 126 N.W. 550 (1910); see also *Estate of Yates*, 88 Okla. 259, 213 P. 87 (1923). Contra, *Bransford v. Crawford*, 51 Ga. 20 (1874); see also *Hornstra v. Avon State Bank*, 55 S.D. 513, 226 N.W. 740 (1929).

3. *How is the gift valued?* It is commonly provided that if the value is stated in the writing accompanying the gift then that value is controlling; but if not so stated, then the value at the time the gift was made governs. The following exceptions should be noted: In Connecticut, the statute perhaps means that the value at the time of final distribution controls; in South Carolina the value at the time of decedent's death controls; and in Georgia the writing is not conclusive as to value "unless inserted as part of testator's will or referred to therein."

4. *Are both realty and personalty included?* Thirty-seven states so provide, and in most of the others the language is "property," which presumably would include both kinds. In District of Columbia and Maryland, however, the statute appears to cover only gifts of realty. It is not uncommon to have a provision to the effect that an advancement of realty shall be taken out of the donee's distributive share of realty, and one of personalty taken out of the distributive share of personalty, with any excess of one type made up out of the other type. The Vermont statute is of this type, but further provides that the heirs

can agree to some different arrangement. In Indiana, however, apparently all advancements, whether of realty or personalty, are taken out of the share of personalty.

5. *Education of a child as an advancement.* Some states provide that education or maintenance of a child shall not be deemed an advancement; this is usually limited to minor children.

6. *Do advancements apply in partial intestacy?* Most of the statutes throw no light on this point. But in Alabama the statute refers to the executor or administrator, and in Georgia the decedent's will is referred to. (See quotation in part 3 supra.) In Kansas, though the statute does not say anything about partial intestacy, it could apply in such a case. In Kentucky, Tennessee, Virginia and West Virginia the statute clearly covers partial intestacy, since in all of these states a gift by will is considered as an advancement. In these four states, intent apparently is not a factor; if one person has received more than others, an equalization must take place.

The statutes on advancements are as follows: Ala. Code (1940) t. 16, §§ 11, 14 to 24; Ariz. Code (1939) §§ 38-1508, 39-107; Ark. Dig. Stat. (1937) §§ 4353 to 4356; Cal. Prob. Code Ann. (Deering, 1944) §§ 1050 to 1054; Colo. Stat. (1935) c. 176, §§ 5, 6, 223; Conn. Gen. Stat. (1930) § 4980; Del. Rev. Code (1935) §§ 3752, 3851; D. C. Code (1940) §§ 18-108, 18-707; Fla. Stat. Ann. (1941) § 734.07; Ga. Code Ann. (1936) §§ 113-1013 to 113-1017; Idaho Laws Ann. (1943) §§ 14-107 to 14-111, 15-1323; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 166; Ind. Stat. (Burns, 1933) §§ 6-1503 to 6-1504, 6-2354 to 6-2355; Iowa Code (1939) § 12029; Kan. Gen. Stat. (Supp. 1943) § 59-510; Ky. Rev. Stat. (1944) § 391.140; Me. Rev. Stat. (1944) c. 156, §§ 4 to 6; Md. Code (1939) art. 93, § 133; Mass. Ann. Laws (1932) c. 196, §§ 3 to 8; Mich. Stat. Ann. (1943) §§ 27.3178(157) to 27.3178(162); Minn. Stat. (1941) §§ 525.53, 525.531; Minn. Laws 1943, c. 322, § 14; Miss. Code (1942) § 475; Mo. Rev. Stat. Ann. (1942) §§ 311, 312, 527; Mont. Rev. Code (1935) §§ 7082 to 7086, 10345; Neb. Rev. Stat. (1943) §§ 30-112 to 30-117; Nev. Comp. Laws (1929) § 9921; Nev. Comp. Laws (Supp. 1941) §§ 9882.267, 9882.301 to 9882.305; N. H. Rev. Laws (1942) c. 360, §§ 13 to 16; N. J. Rev. Stat.

(1937) §§ 3:3-3, 3:5-2; N. Y. Dec. Est. Law, §§ 85, 86; N. C. Gen. Stat. (1943) §§ 28-150, 28-151, 29-1(2); N. D. Rev. Code (1943) §§ 30-2112 to 30-2117; Ohio Gen. Code (Page, 1937) §§ 10503-19 to 10503-22; Okla. Stat. (1941) t. 58, § 661; t. 84, §§ 223 to 227; Ore. Comp. Laws (1940) §§ 16-103, 16-301 to 16-306; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 135; R. I. Gen. Laws (1938) c. 567, §§ 22, 23; S. C. Code (1942) § 8909; S. D. Code (1939) §§ 35.1706, 56.0114 to 56.0118; Tenn. Code (Michie, 1938) §§ 8402 to 8405; Tex. Civ. Stat. Ann. (Vernon, 1942) art. 2576; Utah Code (1943) §§ 101-4-18 to 101-4-22, 102-12-9; Vt. Pub. Laws (1933) §§ 2981 to 2986; Va. Code (1942) § 5278; Wash. Rev. Stat. (1932) §§ 1348 to 1353, 1557; W. Va. Code (1943) § 4094; Wis. Stat. (1943) §§ 315.05, 318.24 to 318.29; Wyo. Rev. Stat. (1931) §§ 88-3705 to 88-3707.

§ 31. ABOLITION OF DOWER

The following analysis of statutes on the abolition of dower proceeds on the theory that the essential attribute of common-law dower is the inchoate interest which the wife holds in all lands of which the husband is seized during coverture. If this inchoate interest is retained in the statute law of a state, it may fairly be said that dower is not abolished in that state. It should be pointed out that the community property states are not considered here, since dower forms no part of their scheme of succession. Those states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

According to the express language of the statutes in twelve states, the estates of dower and curtesy are abolished; but in four of these an inchoate interest is in fact retained, so that the abolition of dower and curtesy is negated. In the other eight states of this group the inchoate interest is actually abolished, the interest of the surviving spouse in the decedent's real estate being limited to that owned by him at the time of his death. The twelve states in which dower and curtesy are expressly abolished are as follows:

(a) Abolished in fact as well as by express language: Colo. Stat. (1935) c. 176, § 1; Conn. Gen. Stat. (1930) §§ 5154, 5156; Miss. Code (1942) § 453; N. Y. Real Property Law, § 190; N. D. Rev. Code (1943) § 56-0102; Okla. Stat. (1941) t. 84, § 214; S. D. Code (1939) § 56.0103; Wyo. Rev. Stat. (1931) § 88-4001.

(b) Abolished by express language but not abolished in fact: Ind. Stat. (Burns, 1933) § 6-2353 (§ 6-2325 shows retention of inchoate interest); Me. Rev. Stat. (1944) c. 156, § 8 (c. 156, § 1, shows retention of inchoate interest); Neb. Rev. Stat. (1943) § 30-104 (§ 30-101 shows retention of inchoate interest); Utah Code (1943) § 101-4-9 (§ 101-4-3 shows retention of inchoate interest).

In three other states, although it is not specifically stated that dower is abolished, the statutes have this effect, for the surviving spouse's interest in real estate is limited to that owned at death. Although two of these states retain the word "dower" in their statutes, it is clear that there is no inchoate interest. These states are as follows: Ga. Code Ann. (1936) § 31-101; Tenn. Code (Michie, 1938) § 8351; Vt. Pub. Laws (1933) § 2951.

Four other states have achieved a partial abolition of dower. One of these states cuts off the inchoate interest in lands conveyed more than seven years before claim of dower is made, while another state cuts it off as to lands conveyed before a certain date. The other two states take an opposite course, cutting off the inchoate interest as to lands which the decedent owned at death, but retaining it as to lands which he conveyed without the consent of the surviving spouse. The four states of this group are as follows:

Ark. Dig. Stat. (1937) § 4414. The inchoate right of dower is barred when the husband "has been barred of his title, or of any interest in said property for seven years or more, and also in real property or interest therein conveyed by the husband but not signed by his wife when such conveyance is made or has been made for a period of seven years or more."

Minn. Stat. (1941) § 519.09. "All inchoate estates in dower and curtesy, and all inchoate estates or statutory interests in lieu of dower and curtesy, are hereby abolished in all lands in this state which have been conveyed prior to January 1, 1920, by the husband or wife of the one entitled to such inchoate dower or curtesy, or statutory interest, by a conveyance in writing." (To the effect that the inchoate interest is otherwise retained, see § 525.16, subd. 2.)

Ohio Gen. Code (1937) § 10502-1. "Such dower interest shall terminate and be barred upon the death of the consort except:

"(a) To the extent that any such real property at any time during the marriage was conveyed by the deceased consort, the surviving

spouse not having relinquished or been barred of dower therein; and

“(b) To the extent that any such real property at any time during the marriage was encumbered by the deceased consort by mortgage, judgment, lien (except tax lien), or otherwise, or aliened during the marriage by judicial or other involuntary sale, the surviving spouse not having relinquished or been barred of dower therein. . . .”

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 31. The intestate share of the widow “shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seized; and her share in lands aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seized.”

In all other states, except those having community property legislation, an inchoate interest is retained. No analysis will be made here of these statutes but it may be pointed out that in many states the common-law life estate is changed to a fee; and not infrequently the surviving spouse takes one-half rather than one-third. In some states a nonresident spouse has no inchoate interest, and in some the inchoate interest does not attach to lands sold on judicial sale. See 3 Vernier, *American Family Law* (1935) § 189.

§ 32. AMOUNT DISSENTING SPOUSE MAY OBTAIN

This note deals with the amount which a surviving spouse may take in case of an election against the will. There is great variation in this amount. In some states the surviving husband apparently has no election, in others he may elect but takes less than the widow, while in still other states the two spouses are treated alike. Sometimes the dissenting husband or wife is given both realty and personalty against the will, sometimes realty only. A number of states retain common-law dower and curtesy or a closely analogous estate; while in some states the dissenting spouse takes as in intestacy. In a few states the spouse may choose between dower and an intestate share. The intestate share is, of course, subject to the decedent's debts unless otherwise provided, but dower and curtesy are free of debts.

It is common for the share of the surviving spouse to vary according to the number of heirs or the size of the estate. Thus in a state where the dissenting spouse takes an intestate share, he may be able to take the

whole estate if there are no close heirs, or he may get as little as one-fourth if there are several close heirs, e.g. Neb. Rev. Stat. (1943) § 30-101. Indeed, in states where a surviving spouse takes "a child's share," the proportion taken may obviously be even less than one-fourth. Sometimes the statute fixes a maximum limit on the amount which the dissenting spouse may take, as in New York where he cannot take more than half the net estate in any case. N. Y. Dec. Est. Law, § 18. As an example of the share varying with the size of the estate, Mass. Ann. Laws (1932) c. 191, § 15, provides that if the intestate share which the spouse elects against the will exceeds \$10,000 he may take only the income of the excess over that amount. And in New Hampshire the dissenting spouse may take the first \$5000 and half of the excess if no issue survive. N. H. Rev. Laws (1942) c. 359, §§ 10 to 13.

In twenty-three jurisdictions it is possible for the dissenting spouse to take one-half or more of the estate. These jurisdictions are Arkansas, Colorado, District of Columbia (as to personalty), Illinois, Kansas, Kentucky (as to personalty), Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Vermont and Wyoming. In the remaining states the dissenting spouse takes either a fee in less than half the estate, or a life estate in a half or a third.

Some statutes provide that debts are to be paid before computing the share of the dissenting spouse, Conn. Gen. Stat. (1930) § 5156. Two states provide that one-third of the realty goes to the surviving spouse free from debts, but where there is a possibility of his or her taking more, the statutes give creditors a priority as to the excess. See Me. Rev. Stat. (1944) c. 156, § 1 and Va. Code (1942) §§ 5117 and 5139a. Arkansas is analogous but applies to both realty and personalty. Ark. Dig. Stat. (1937) § 4421. Although the Mississippi statute does not disclose whether or not dower or the intestate share is computed on the basis of the gross or the net estate, *Gordon v. James*, 86 Miss. 719, 39 So. 18, 1 L.R.A. (N.S.) 461 (1905), holds that the net estate controls. In a large number of the states neither the statutes nor the decisions decide this issue.

It is impossible to describe, within the limits of this note, all the conditions under which the dissenting spouse may take a given share of the estate. Therefore, only the largest possible amount which he may take under any circumstances will be noted, it being understood that this amount may depend on the number of heirs or the size of the estate or other factors. The community property states are not listed here, since that system of law proceeds on a different basis; nor are North and South Dakota listed, as there is apparently no election in those states.

Ala. Code (1940) t. 34, § 41. Widow's dower may be a life estate in half the lands owned during the marriage. Under t. 61, § 18 and t. 16, § 10, she may also take an intestate share in the personalty, which may be the entire estate up to \$50,000.

Ark. Dig. Stat. (1937) § 4421. Widow's dower may be half the realty in fee simple and half of the personalty absolutely; as against creditors she may take only one-third of the realty and personalty.

Colo. Stat. (1935) c. 176, § 37. Neither spouse may will away from the other more than half the estate.

Conn. Gen. Stat. (1930) § 5156. Either spouse may take one-third of the realty and personalty, after payment of debts.

Del. Rev. Code (1935) § 3767. Widow's dower is one-third of the lands owned during the marriage.

D. C. Code (1940) § 18-201. Widow's dower is one-third of the lands owned during the marriage. By § 18-215, husband has right of curtesy; amount not set out. Under § 18-211, either spouse may also take an intestate share of personalty; under § 18-702, this may be the whole estate.

Fla. Stat. Ann. (1941) § 731.34. Widow's dower is one-third in fee of all lands owned during the marriage, and one-third absolutely in personalty owned at death. These shares are ratably liable for estate and inheritance taxes and costs of administration.

Ga. Code Ann. (1936) § 31-101. Widow's dower is a life estate in one-third of the lands owned at death.

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 168. Either spouse may take half the realty and personalty owned at death, subject to debts.

Ind. Stat. (Burns, 1933) § 6-2325. Widow may take as heir one-third of all land owned during the marriage. By § 6-2313, this is free from creditors except that if the realty exceeds \$10,000 in value she takes only one-fourth as against creditors, and only one-fifth if it exceeds \$20,000. By § 6-2321, husband may take as heir one-third of the wife's realty subject to her debts contracted before marriage.

Iowa Code (1939) § 11990. Either spouse may take dower, a fee simple in one-third of the land owned during the marriage.

Kan. Gen. Stat. (Supp. 1943) § 59-602. Neither spouse may will away from the other more than half his property.

Ky. Rev. Stat. (1944) § 392.020. Either spouse may have dower, a life estate in one-third of the land owned during the marriage, and an absolute estate in half the surplus personalty.

Me. Rev. Stat. (1944) c. 156, § 14. Either spouse may take an intestate share. Under c. 156, §§ 1 and 20, this may be all the realty and personalty; one-third of the realty goes free from debts. To the effect that the share of personalty is taken from the net estate, see *Fogg's Estate*, 105 Me. 480, 74 A. 1133 (1909); *In re Appeal of Smith*, 107 Me. 247, 78 A. 97 (1910).

Md. Code (Supp. 1943) art. 93, § 314. Either spouse may take \$2000 or its equivalent in property and half the residue of the land as heir and half the surplus personalty.

Mass. Ann. Laws (1932) c. 191, § 15. Either spouse may take an intestate share; if this exceeds \$10,000 he takes only the income of the excess over this amount; and if there are no kindred the spouse is limited to the interest he would take if there were kindred but no issue. By c. 190, § 1, this intestate share may be all the realty and personalty, subject to debts.

Mich. Stat. Ann. (1943) § 27.3178(139). Widow may elect intestate share, up to \$5000 of the personalty and half of the remainder of her intestate share; if her intestate share of realty is all the realty, she takes half absolutely, and half subject to the provisions of the will.

Minn. Stat. (1941) § 525.16. Either spouse may take as heir half of the realty owned during the marriage and half of the personalty.

Miss. Code (1942) § 668. Either spouse may take an intestate share, but not more than half the realty and personalty. This share is taken from the net estate; *Gordon v. James*, 86 Miss. 719, 39 So. 18, 1 L.R.A. (N.S.) 461 (1905).

Mo. Rev. Stat. Ann. (1942) § 323. Either spouse may take a child's share of the personalty. By §§ 324 and 325, either spouse may take half the realty and personalty absolutely, subject to debts; the widow is also entitled to all the realty and personalty which came to the husband in right of the marriage, and to all his personalty which came to him with the written assent of the wife.

Mont. Rev. Code (1935) § 5821. Widow may take absolutely half the realty owned at death, subject to debts.

Neb. Rev. Stat. (1943) § 30-107. Either spouse may take an intestate share. By § 30-101, this may be the whole net estate.

N. H. Rev. Laws (1942) c. 359, §§ 10 to 13. Either spouse may take \$5000 in value and half the remainder of both realty and personalty, subject to debts.

N. J. Rev. Stat. (1937) § 3:37-1 and 3:37-2. Dower and curtesy, a life estate in half the realty owned during the marriage.

N. Y. Dec. Est. Law, § 18. Either spouse may take an intestate share, but not over half the net estate.

N. C. Gen. Stat. (1943) § 30-2. Widow may take intestate share of realty and personalty. Under §§ 28-149 and 29-1, this may be the whole estate. Husband has curtesy under § 52-16.

Ohio Gen. Code (Page, Supp. 1944) § 10504-55. Either spouse may take intestate share, but not over half the net estate.

Okla. Stat. (1941) t. 84, § 44. Neither spouse may will away from the other so much that the survivor takes less than his intestate share, except that he may will away half the property not acquired by joint industry during the marriage. By t. 84, § 213, the intestate share may be the whole estate.

Ore. Comp. Laws (1940) §§ 17-101 (amended Laws 1945, c. 66) and 17-401. Dower and curtesy, a life estate in half of the land owned during the marriage.

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 261. Either spouse may take an intestate share of realty and personalty. By t. 20, § 111, this may be the whole estate.

R. I. Gen. Laws (1938) c. 566, § 12. Husband has curtesy, amount not set out. Under c. 418, § 1, widow's dower is one-third of all lands owned during the marriage.

S. C. (Apparently has common-law dower.)

Tenn. Code (Michie, 1938) §§ 8351 and 8353. Widow's dower, life estate in one-third of lands owned at death. By § 8359, husband has curtesy, and may also take one-third of the personalty. Under § 8360, widow may have same share of personalty.

Utah Code (1943) § 101-4-3. Widow takes as heir a fee simple in one-third of all land owned during the marriage, free from debts except certain specified liens.

Vt. Pub. Laws (1933) §§ 2951 and 2964. Either spouse may take fee in half of all land owned at death.

Va. Code (1942) §§ 5117, 5139a. Dower and curtesy, which may be all the realty; one-third of all land owned during the marriage is free from creditors' claims.

W. Va. Code (1943) § 4096. Either spouse may take dower, one-third of all land owned during the marriage.

Wis. Stat. (1943) § 233.01. Widow's dower, one-third of all lands owned during the marriage.

Wyo. Rev. Stat. (1931) § 88-101. Either spouse may take half the real and personal estate, subject to debts.

§ 32. SPOUSE'S MISCONDUCT AS BARRING RIGHT OF ELECTION

In general on this subject, see 3 Vernier, *American Family Law* (1935) § 202. Twenty-four states are listed there as having statutes on the subject, but the Illinois statute was omitted in the recent probate code, bringing the number down to twenty-three. Of these twenty-three states, five purport to bar dower only, and do not affect any other rights which the surviving spouse might have in the property of the decedent. The statutes of these five jurisdictions are Ark. Dig. Stat. (1937) §§ 4397, 4398; D. C. Code (1940) § 18-203; Ga. Code Ann. (Supp. 1943) § 31-110, subd. 5; N. J. Rev. Stat. (1937) §§ 3:39-2, 3:39-3; Ohio Gen. Code (Page, 1937) § 10502-5. The significant language of the remaining 18 states is as follows:

Conn. Gen. Stat. (1930) § 5156. Spouse forfeits statutory share "who, without sufficient cause, shall have abandoned the other and continued such abandonment to the time of the other's death."

Del. Rev. Code (1935) § 3775. A wife who wilfully leaves her husband and goes with an adulterer forfeits dower "and all demands, as his widow, upon his real or personal estate, and any estate, charge, or benefit" settled on her in lieu of dower.

Ind. Stat. (Burns, 1933) § 6-2329. Wife who leaves her husband and is living in adultery at the time of his death takes "no part of the estate of her husband." Section 6-2330 has a similar provision for an adulterous husband, and § 6-2331 has a similar provision for a husband who abandons his wife without just cause and fails to make suitable provision for her.

Iowa Code (1939) § 12032. No person who feloniously kills the decedent shall inherit or receive any interest as surviving spouse, or take any devise or legacy.

Ky. Rev. Stat. (1944) § 392.090. "If either spouse voluntarily leaves the other and lives in adultery, the offending party forfeits all right and interest in and to the property and estate of the other, unless they afterward become reconciled and live together as husband and wife."

Me. Rev. Stat. (1944) c. 153, § 45. If a wife deserts her husband without just cause, or if he is living apart from her for just cause, after one year the husband may petition the probate court for a decree permitting him to "convey his real property in the same manner as if he were sole, and no portion of his estate shall descend to his said wife at his decease, neither shall she be entitled to receive any distributive share thereof or to waive any will made by him in her favor." C. 153, § 44, has a similar provision in favor of the wife.

Md. Code (1939) art. 27, § 19. Upon conviction for bigamy a husband forfeits all claim or title as tenant by curtesy, and all his claim or title to any estate, real, personal or mixed which he may have in right of his first wife; a wife who is convicted of bigamy forfeits dower and the distributive share of personalty which she would be entitled to if the husband had died intestate.

Mass. Ann. Laws (1932) c. 209, §§ 35 and 36 are similar to the Maine statute described above. The defaulting spouse shall not be

entitled to waive the provisions of the will or claim such portion of his estate as he would take if the decedent died intestate, or to dower or curtesy.

Mich. Stat. Ann. (1937) § 26.1181. No person who is living in bigamy at the time of the death of his lawful spouse "shall inherit or take any estate, right or interest whatever, by way of dower, allowances, inheritance, distribution or otherwise, in the property or estate, real or personal, of the deceased."

Minn. Stat. (1941) § 519.07 is similar to the Maine statute described above. A person who is deserted by his spouse for one year, or who would be entitled to a divorce, or when the spouse has been insane for ten years, may apply to the district court for a decree permitting him to convey his lands as if unmarried, and barring the defaulting spouse from "any right or estate by the curtesy or in dower, or otherwise" in his lands.

Mo. Rev. Stat. Ann. (1942) § 337. A wife who voluntarily leaves her husband and goes away and continues with an adulterer, or abandons him without cause and continues to live separate for one year next preceding his death, or after being ravished consents to the ravisher, forfeits dower, jointure, homestead and statutory allowances; a husband guilty of similar offenses forfeits his inheritance, jointure, homestead, curtesy and statutory allowances in real and personal property.

N. H. Rev. Laws (1942) c. 359, § 18. "If a husband has willingly abandoned his wife and has absented himself from her, or has willfully neglected to support her, or has not been heard from, in consequence of his own neglect, for the term of three years next preceding her death, he shall not be entitled to any interest or portion in her estate, real or personal, except such as she may have given to him in her will." C. 359, § 19 has similar penalties if the decedent was justifiably living apart from the surviving husband or wife because the survivor was guilty of conduct constituting cause for divorce.

N. Y. Dec. Est. Law, § 18, subd. 4. "No husband who has neglected or refused to provide for his wife, or has abandoned her, shall have the right of such an election."

Subd. 5. "No wife who has abandoned her husband shall have the right of such an election."

N. C. Gen. Stat. (1943) § 28-10. Divorce a vinculo or felonious slaying of decedent bars rights to a distributive share of the personalty. Sections 28-11 and 28-12 have similar penalties against a spouse who elopes with an adulterer and is not living with the decedent at the time of his death. Sections 52-19 and 52-20 have similar rules, and also bar the year's allowance and rights in realty under a settlement made in consideration of marriage.

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 41. A husband who for one year prior to the wife's death neglected or refused to provide for her, or deserted her, cannot claim any title or interest in her real or personal estate under the rules of intestate succession. Section 42 has similar penalties for a wife who for one year or more previous to the husband's death maliciously and wilfully deserted him.

S. C. Code (1942) § 8912. A wife who has forfeited dower also forfeits her distributive share of real estate under the rules of intestate succession. Sections 8583 and 8584 provide for forfeiture of dower by desertion without cause or elopement with an adulterer.

Va. Code (1942) § 5123. "If a wife wilfully deserts or abandons her husband and such desertion or abandonment continues until his death, she shall be barred of all interest in his estate as tenant by dower, distributee or otherwise." By § 5277, an adulterous spouse is barred of an intestate share in the personal estate.

W. Va. Code (1943) § 4093. A spouse who has forfeited dower also forfeits "any part of the estate of the other, unless the same be given him or her by will and then only so much as is so given." Section 4114 provides for forfeiture of dower by adultery or desertion without cause.

Many of these statutes have very limited application. Thus, the Michigan statute applies only in case of a bigamous marriage, which is probably relatively uncommon. The statutes which provide a forfeiture in case of mere desertion without cause have a wider application, and certainly there is as much reason to bar the right of election in case of desertion as in case of adultery or bigamy. But such a statute may lead to much litigation. The type of statute found in Maine, Massachusetts and Minnesota, providing for a decree that the spouse has forfeited his or her rights, has the merit that any litigation will take place during the lifetime of both spouses, and is likely to take place

within a relatively short period after the desertion. But what if they effect a reconciliation? Will the decree automatically be voided, or must the parties go into court and have the decree set aside? No cases have been found on this question.

It is noteworthy that Kansas, which enacted a probate code recently, has no statute barring the right of election, and the Illinois statute was omitted from the recent probate code of that state.

This note does not include statutes which deal generally with the effect of murder of an ancestor by an heir, although such statutes may well include the case of the murder of a spouse by a surviving spouse. However, the Iowa and North Carolina statutes which deal expressly with this type of misconduct by a surviving spouse have been referred to above.

§ 63. LIABILITY OF CUSTODIAN OF WILL

All the states have statutes requiring the custodian of the will to produce it. Such statutes are not new. See, for example, 2 N. Y. Rev. Stat. (1829) 60, § 25; 3 Cal. Rev. Laws, Code Civ. Proc. (1871) § 1298. Most legislative provisions today treat the refusal to produce the will as a contempt, giving the court power to imprison the custodian until he produces the will. Six jurisdictions, however, provide only a criminal sentence, in the form of a fine or imprisonment for a definite period, or both. These six are Connecticut, District of Columbia, Maryland, South Carolina, Tennessee and Washington. A few states provide for enforcement both by criminal sentence and imprisonment for contempt. No criminal penalties have been set up in the Model Probate Code, since it is felt that such provisions rightfully belong in the penal code rather than in the probate code.

It is common to provide for restitution to persons damaged by withholding of the will, either by making the custodian liable in damages to all persons injured, or by a penalty of a stated sum per day or per month, to be recovered for the benefit of the estate. Thus in Michigan the custodian is given thirty days to produce the will, and after that time he may be forced to pay \$10 per day for the benefit of the estate. Mich. Stat. Ann. (1943) § 27.3178(88). In Illinois the amount is \$20 per month after the lapse of thirty days. Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 212. This type of statute, embody-

ing a blanket penalty, has the merit that the damages may be recovered in a single suit, but this advantage is outweighed by two other considerations. The sum recoverable bears no relation to the actual damages sustained; it may be larger or smaller than the actual damages. Moreover, the benefits presumably enure to the various distributees in proportion to their shares in the estate, although possibly they have not been damaged in this proportion. For example, a legatee who is bequeathed the same amount which he would take in case of intestacy is not damaged by withholding of the will, while one who would take nothing by intestacy is damaged to the full extent of his legacy. For these reasons the Model Probate Code does not contain this type of provision, but provides instead for liability to all persons damaged. A similar statute is found in twenty-three states, as follows: Ala. Code (1940) t. 61, § 37; Ariz. Code (1939) § 38-201; Cal. Prob. Code Ann. (Deering, 1944) § 320; Colo. Stat. (1935) c. 176, § 46; Fla. Stat. Ann. (1941) § 732.22; Ind. Stat. (Burns, 1933) § 7-405; Iowa Code (1939) § 11862; Kan. Gen. Stat. (Supp. 1943) § 59-621; Me. Rev. Stat. (1944) c. 141, § 4; Mass. Ann. Laws (1932) c. 191, § 13; Neb. Rev. Stat. (1943) § 30-215; Nev. Comp. Laws (Supp. 1941) § 9882.04; N. M. Stat. (1941) § 32-201; N. D. Rev. Code (1943) § 30-0502; Ohio Gen. Code (Page, 1937) § 10504-13; Okla. Stat. (1941) t. 58, § 21; Ore. Comp. Laws (1940) § 19-201; S. D. Code (1939) § 35.0201; Utah Code (1943) § 102-3-1; Wash. Rev. Stat. (1932) § 1379; W. Va. Code (1943) § 4061; Wis. Stat. (1943) § 310.02; Wyo. Rev. Stat. (1931) § 88-209.

A further penalty, in addition to liability for damages, is imposed in Kansas, where a person who knowingly withholds a will for more than a year from the date of testator's death is barred from all rights under the will. Kan. Gen. Stat. (Supp. 1943) § 59-618. In Ohio the custodian is barred of all rights both testate and intestate if he withholds the will for three years. Ohio Gen. Code (Page, 1937) § 10504-14.

One more feature of these statutes should be mentioned. It is frequently provided that the custodian must surrender the will within a specified time, usually thirty days after being informed of the testator's death, e.g., Mass. Ann. Laws (1932) c. 191, § 13. No

time limit has been written into the Model Probate Code; in the absence of any rule, a reasonable time is implied, and it is felt that this is sufficiently definite.

§ 68. REQUIREMENT OF NOTICE FOR PROBATE OF WILL
OR GRANT OF LETTERS OF ADMINISTRATION *

To lawyers and judges in states which require notice for the initiation of probate or administration, it may come as a shock to discover that there are many jurisdictions in which these proceedings can be had without any notice whatever. It is the purpose of this note to investigate the situation in the various states, in order to show that in nearly half of them notice is not considered essential. The sole question to be considered is notice or no notice; this note is not concerned with the kind of notice required, nor with the possibility of waiver of notice by interested parties. Nor does it deal with probate of nuncupative wills, for which the requirements may be entirely different from those for probate of ordinary wills.

A few words should be said regarding the old English rule as to notice. As far as wills were concerned, probate could be in either common or solemn form, in the former of which no notice was given. Notice was required for probate in solemn form, and interested persons could demand such a probate following probate in common form. Atkinson, Wills (1937) 428. The picture is less clear in the case of intestate estates. In 2 Burn, Ecclesiastical Law (1763) 637, the only mention of notice seems to be in connection with the grant of letters to creditors; it is there said that "the practice is usually for the ordinary first to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor." The same statement appears in 4 Burn, Ecclesiastical Law (9th ed., 1842) 366, following which the editor of this edition interpolates the following statement: "The practice indeed is most correctly stated by Dr. Burn, for it has become an unfailing maxim of the courts of probate, that where a party, whether executor, residuary legatee, or next of kin, has a *prior* title to a grant of administration, he or they must be cited

* This note is substantially the same as a comment by Elizabeth Durfee, published in 43 Mich. L. Rev. 1153 (1945).

before it is granted to any other person. And where there are two persons equally entitled, e.g., two universal legatees, the court will grant administration to one after a decree with intimation has issued to the other." Conset, *The Practice of the Spiritual or Ecclesiastical Courts* (1708) 14 implies that no notice is necessary in case of grant of letters to the surviving spouse, but states that when the next of kin apply, citation is required "against all and singular next of kindred." In any case, there seems to have been no statutory requirement of notice.

The rule today in England remains unchanged as to the probate of wills, and the terms common form and solemn form are still used. 14 Halsbury's *Laws of England* (1934) 205-235. In case of intestacy, notice is not required, but may be ordered by the court. Court rules provide that the registrars "may require proof" that notice of the application for letters of administration has been given to those equally entitled; Rules for Non-Contentious Business, Rule 28 P. R. and 34 D. R., set out in Tristram and Coote, *Probate Practice* (18th ed., 1940) 805. These rules further require a person intending to oppose the grant of letters to enter a caveat or request for notice. Rule 59 P. R. and 72 D. R., *id.* at 812. 14 Halsbury's *Laws of England* (1934) § 310 states that before a citation is signed by the registrar a caveat must be entered against a grant being made, and states further, at § 429, that "the court usually requires citation of the parties having a claim to the grant" before it issues letters under its discretionary power to one not entitled, "but it will in special circumstances make the grant without citation."

In the United States, notice is required for probate of a will in twenty-eight jurisdictions. These are Ala. Code (1940) t. 61, §§ 48, 50; Ariz. Code (1939) §§ 38-206, 38-207; Cal. Prob. Code Ann. (Deering, 1944) § 327; Colo. Stat. (1935) c. 176, §§ 50, 51; Conn. Gen. Stat. (1930) § 4884 (but court may dispense with notice for cause shown); D. C. Code (1940) § 19-301; Idaho Laws Ann. (1943) §§ 15-206, 15-207; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 216; Iowa Code (1939) § 11865; Kan. Gen. Stat. (Supp. 1943) § 59-2222; Me. Rev. Stat. (1944) c. 141, § 5; Mich. Stat. Ann. (1943) § 27.3178(99); Minn. Stat. (1941) § 525.24; Mont. Rev. Code (1935) §§ 10025, 10026; Neb. Rev.

Stat. (1943) § 30-217; Nev. Comp. Laws (Supp. 1941) § 9882.11; N. M. Stat. (1941) §§ 32-204, 32-206; N. Y. Surr. Ct. Act, § 140; N. D. Rev. Code (1943) §§ 30-0508, 30-0509; Ohio Gen. Code (Page, Supp. 1945) § 10504-17; Okla. Stat. (1941) t. 58, § 25; R. I. Gen. Laws (1938) c. 571, § 3; S. D. Code (1939) § 35.0206 (amended Laws 1945, c. 150); Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3333; Utah Code (1943) § 102-3-5; Vt. Pub. Laws (1933) § 2763; Wis. Stat. (1943) § 310.04; Wyo. Rev. Stat. (1931 and Supp. 1940) §§ 88-214, 88-215.

In sixteen states, on the other hand, the practice as embodied in the statutes is based on the English system of probate in common and solemn form, with or without modifications, so that probate can be had without notice. These sixteen states are Ark. Dig. Stat. (1937) §§ 14540 and 14544; Del. Rev. Code (1935) § 3799; Fla. Stat. Ann. (1941) §§ 732.23, 732.28, 732.29; Ga. Code Ann. (1936) §§ 113-601, 113-602, 113-607; Ky. Rev. Stat. (1944) §§ 394.170, 394.180, 394.220; Md. Code (1939) art. 93, § 360; Miss. Code (1942) §§ 502 to 504; Mo. Rev. Stat. Ann. (1942) §§ 1 and 529 (the Missouri statute is ambiguous, but see *State ex rel. Mitchell v. Gideon*, 215 Mo. App. 46, 237 S. W. 220 (1921)); N. H. Rev. Laws (1942) c. 349, § 2, and c. 351, §§ 6 and 7; N. J. Rev. Stat. (1937) §§ 3:2-21 and 3:2-22; N. C. Gen. Stat. (1943) § 31-32; Ore. Comp. Laws (1940) § 19-204; S. C. Code (1942) § 8932; Va. Code (1942) §§ 5253, 5254, 5259; Wash. Rev. Stat. (1932) § 1380; W. Va. Code (1943) §§ 4065 and 4070.

In four states the statutes are silent: Massachusetts, Indiana, Pennsylvania and Tennessee. Notice seems to be required in Massachusetts even without a statute, but apparently is not necessary in the other three states. Newhall, *Settlement of Estates and Fiduciary Law in Massachusetts* (3rd ed., 1937) § 28; 1 Henry, *Probate Law and Practice of Indiana* (1931) 760; 2 Hunter, *Pennsylvania Orphans' Court Commonplace Book* (1939) 1122. No authority was found for Tennessee, but a local probate expert has advised that notice is not required in that state.

In the case of intestate estates, statutes require notice in all cases in nineteen jurisdictions. Ariz. Code (1939) § 38-406; Cal. Prob. Code Ann. (Deering, 1944) § 441; Conn. Gen. Stat. (1930)

§ 4904 (but court may dispense with notice for cause shown); D. C. Code (1940) § 20-217 ("such notice . . . as the rules of the court may require"); Ga. Code Ann. (1936) § 113-1212; Idaho Laws Ann. (1943) § 15-320; Kan. Gen. Stat. (Supp. 1943) § 59-2222; Mich. Stat. Ann. (1943) § 27.3178(126); Minn. Stat. (1941) § 525.282; Mont. Rev. Code (1935) § 10076; Neb. Rev. Stat. (1943) § 30-331; Nev. Comp. Laws (Supp. 1941) § 9882.56; N. D. Rev. Code (1943) § 30-0206; R. I. Gen. Laws (1938) c. 571, § 3; S. C. Code (1942) § 8972; S. D. Code (1939) § 35.0506; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3333; Utah Code (1943) § 102-4-8; Wis. Stat. (1943) § 311.03.

In thirteen other states notice is not required except under certain circumstances. Thus in one group of states notice is required only to persons preferred over the petitioner to be administrator. In Florida notice must be given "to all known persons qualified to act as administrator and entitled to preference over the person applying." Fla. Stat. Ann. (1941) § 732.43. The Illinois statute requires notice to one "entitled either to administer or to nominate a person to administer in preference to the petitioner." Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 251. But see c. 3, § 252, requiring notice in all cases when letters are sought on presumption of death. In New Jersey all next of kin or parties by law entitled to administer, both residents and nonresidents, must be notified if the petitioner does not have preference or when application is made after forty days from decedent's death. N. J. Prerog. Ct. Rules (1941 Revision) Rules 4 and 7; Orphans' Ct. Rules (1941 Revision) Rules 2 and 5. In New York, notice must be given to competent residents of the state who have a right to administration prior or equal to that of the petitioner, and if the petitioner is not entitled to share in the distribution of the estate notice must also be given to "all resident infants and adjudged incompetents who are so entitled." N. Y. Surr. Ct. Act, § 120. The Oklahoma statute provides that no notice shall be given "if the petition asks for the appointment of some person entitled under the law to appointment, and there shall accompany such petition a waiver of all persons having a prior right to appointment." Okla. Stat. (1941) t. 58, § 128. If there is no one with a prior right to appointment,

the petitioner may presumably be appointed without even the formality of a waiver of notice.

New Hampshire also belongs in this group, for its statute provides that the judge may at discretion proceed without notice "in the appointment of the person entitled to such trust, or of the person by him nominated, as administrator." N. H. Rev. Laws (1942) c. 349, § 2. Since the surviving spouse, next of kin and suitable persons are equally entitled to administration under c. 352, § 2, it is clear that notice is not necessary in the normal case in New Hampshire.

In Washington notice is not required if the application for letters "be presented by or on behalf of the surviving husband or wife." Wash. Rev. Stat. (1932) § 1433. Similarly in Kentucky, notice is required only "if there be no surviving spouse, or if such spouse waives the right of appointment or is not qualified to act and does not nominate a suitable administrator and there are more than one resident heir at law entitled to appointment. . . . Notice of said hearing shall be given to the surviving spouse and all known heirs of the deceased residing in the state." Ky. Rev. Stat. (1944) § 395.015. The court may in its discretion dispense with notice altogether in any estate where the gross amount involved is less than \$1,000. Ky. Rev. Stat. (1944) § 395.016.

In another group of states the only statutory requirement for notice is that the preferred persons be notified if they fail to apply for letters for thirty days and it is sought to appoint a stranger or a creditor. In Maine, any suitable person may be appointed if the preferred persons are unsuitable, "or being residents in the county, they after due notice neglect or refuse for thirty days from the death of the intestate to take out letters of administration." Me. Rev. Stat. (1944) c. 141, § 18. And in Massachusetts a creditor may be appointed "after public notice upon the petition" if the preferred persons renounce or fail for thirty days after the death of the intestate. Mass. Ann. Laws (1932) c. 193, § 1. Similarly in North Carolina, any suitable person may be appointed if those entitled to preference fail for thirty days, after citation to such persons; furthermore, "if no person entitled to administer applies for letters of administration on the estate of a decedent within six months from his death, then the clerk may, in his discretion,

deem all prior rights renounced." N. C. Gen. Stat. (1943) § 28-15. No notice is necessary after the six months have elapsed. *Withrow v. DePriest*, 119 N. C. 541, 26 S. E. 110 (1896).

The remaining two states of the thirteen which require notice only under certain circumstances are Maryland and Ohio. In Maryland "it shall not be necessary to give notice to a party entitled to administration if he be out of the State, nor shall it be necessary to summon or notify collateral relations more remote than brothers and sisters of the intestate, in order to exclude them from the administration." Md. Code (1939) art. 93, § 33. The only requirement in Ohio is for notice to "the person or persons resident of the county entitled to administer the estate." Ohio Gen. Code (Page, 1937) § 10509-4.

In addition to the thirteen states just described, there are three more whose statutes provide for notice at the option of the court. In Arkansas and Missouri notice "may" be given to the preferred persons if they fail to apply for thirty days, while in Oregon the court "in its discretion may, if they reside within the county," order notice to such persons. Ark. Dig. Stat. (1937) § 8; Mo. Rev. Stat. Ann. (1942) § 8; Ore. Comp. Laws (1940) § 19-211. The wording of the Oregon statute makes it clear that notice is not required, and the same would seem to be true of Arkansas and Missouri. Indeed, this assumption is borne out as to Arkansas by correspondence with a local probate expert, who states that notice is not required there.

In the remaining thirteen states the statutes are silent as to any requirement of notice, creating a presumption that administration may be had without any prior notice. These states are Alabama, Colorado, Delaware, Indiana, Iowa, Mississippi, New Mexico, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia and Wyoming. No case law on the subject has been found, but probate experts in eight of these states—Alabama, Colorado, Delaware, Mississippi, Pennsylvania, Tennessee, Vermont and West Virginia—have advised that notice is not required in those states, although in some of them it is the local practice to give at least some sort of notice. It should be remembered that every state, except Massachusetts and Virginia, requires a published notice to creditors to file their claims, and this notice may to some extent serve as a substitute for notice before appointment, since

it gives public notoriety to the fact that an administration has been commenced.

There seems to be no correlation between requirements of notice in testate and in intestate estates. Some states require notice in both cases, some in neither; some states require notice for one and not for the other.

The box-score thus stands as follows:

Testate estates:

Notice required in 29 states.

Notice not required in 19 states.

Intestate estates:

Notice required in 19 states.

Notice required only under certain circumstances in 13 states.

Notice never required in 16 states.

§ 73. LIMITATIONS ON PROBATE OF LATER WILL

This note deals with the narrow question of whether a later will may be probated after the period for contesting or appealing the probate of an earlier will has expired. There is direct authority on this question in about half the states, and in several others there is some indication of how the question will be answered when it arises.

Though the problem has been but little affected by statute, legislation on the question is found in a few jurisdictions. In California and Nevada it is expressly provided that failure to contest does not bar probate of a later will, and in Ohio the statute gives the court the same authority to admit a later will that it would have if no earlier one had been probated. In Kentucky a later will may be probated within twenty-five years after testator's death. In North Dakota, Oklahoma and South Dakota, on the other hand, presentation of the later will is one of the statutory grounds of contest after probate, and such proceedings are governed by the contest statute. There are in addition a few states whose statutes contemplate probate of a later will, but these statutes are silent on the question of a time limit. This group of statutes seems to assume that the later will will be presented before the close of administration, but it may be questioned whether this would prevent probate at a later time. In this group are Kansas, New York,

North Carolina and a few other states. In connection with this problem, statutes which place an absolute limit on probate of any will necessarily apply to the two-will situation; but some limitation statutes apply only to the will introduced in the original administration.

Where there is no statute settling the question, the cases take two general lines. In the states having contest after probate the issue is whether probate of the later will constitutes a contest of the earlier one. About half the courts which have passed upon the issue have held that it is a contest, and hence within the period of limitations for such contest; others have held that it is not a contest and that the limitation statute does not apply. In the states which have no contest after probate, the question has not been whether the period for appealing the first probate constitutes a bar, but rather whether the probate court has the power to set aside its prior decree. Most of these courts have found such a power.

In the states which hold that probate of the later will is a contest of the earlier one, fraud in the suppression of the second will is usually deemed immaterial. If the statute of limitations for contest contains no saving clause for cases of fraud, the courts refuse to read in any such exception. On the other hand, in several of the states which permit the later probate at any time the proponent is required to explain his delay in presenting the second will, and fraud may therefore become an essential fact to be proved. In Illinois, for example, the later will may be probated only if it can be shown that it was fraudulently concealed or that its existence was unknown. In Massachusetts also, the trend seems to be toward a strict requirement of fraud or mistake.

It must be remembered that there may be other remedies in addition to probate of the later will. Thus in Florida, where the statute permits probate of the later will only while administration remains uncompleted, another statute provides for impressing a constructive trust on the assets in the hands of heirs, legatees or distributees; this remedy, however, is available for only three years after discharge of the representative, and can reach only those assets which remain in their original form or can be traced. Even without such a statute, constructive trust or damages in tort may be available, e.g., *Dulin v. Bailey*, 172 N. C. 608, 90 S. E. 689 (1916). See Evans, "Torts to Expectancies

in *Decedents' Estates*," 93 U. Pa. L. Rev. 187 (1944); annotations in 52 A. L. R. 779 and 65 A. L. R. 1119.

In general on the subject of probate of the later will, see annotation in 107 A. L. R. 249.

Alabama. A later will cannot be probated after the period to contest has expired.

Hardy v. Hardy's Heirs, 26 Ala. 524 (1855) was a petition for probate of a later will nine years after probate of the earlier one. The reasons for delay are not given. Probate was denied. *Held*, the later instrument revokes the first one pro tanto, and impeaches its validity; but this can only be done in the manner and within the time provided for by the statute governing contest of wills after probate.

Watson v. Turner, 89 Ala. 220, 8 So. 20 (1889). The probate court had admitted to probate a codicil over twenty years after probate of the will. This is a bill to contest the codicil. *Held*, the codicil cannot be probated after the period to contest the will has run.

See, also, *Caverno v. Webb*, 239 Ala. 671, 196 So. 723 (1940), citing the two above cases with approval. But see *Jordan v. Tharp*, 223 Ala. 619, 137 So. 667 (1931), involving mistake.

California. By statute, probate of a later will is not within the limitation period for contest.

Cal. Prob. Code Ann. (Deering, 1944) § 385. "Failure to contest a will does not preclude the subsequent probate of another will of the decedent."

Colorado. The statutes on probate of a later will fail to set out any time limit for such proceedings, and on the contrary indicate that they may be brought at any time. Therefore they are not within the period of limitations for contests, which is one year.

Colo. Stat. (1935) c. 176, §§ 66 to 70 inclusive, provide for the probate of a later will after an earlier one has already been probated. There is no time limit made for such proceedings, except as to cutting off the title of bona fide purchasers from a devisee or legatee under the earlier will, and to reimburse the heir, devisee or legatee who made improvements.

Under c. 176, § 65, the period to contest probate of a will is one year. The sections discussed above indicate that probate of a later will

is not within the contest statute, since there seems to be no time limit for such proceedings.

Connecticut. By statute, a later will may be admitted pending proceedings for the settlement of the estate. But it is held that after the estate has been settled, and after the time for appeal from probate has passed, the probate court has no power to set aside the first probate and admit a later will to probate. However, equity can grant relief in case of fraudulent probate of a will, and presumably could act also in the two-will situation.

Conn. Gen. Stat. (1930) § 4898. "When it shall appear to any court of probate, pending proceedings before it for the settlement of the estate of a deceased person as a testate estate, that the will under which such proceedings were commenced . . . had been revoked by the testator by a subsequent will, . . . such court shall have power to revoke . . . any order or decree proving or approving the will so revoked and any other order or decree made and passed by such court in the settlement of such estate under such will. Such court shall have power thereafter to proceed with the settlement of such estate under a subsequent will. . . ."

Delehanty v. Pitkin, 76 Conn. 412, 56 A. 881 (1904). The first will was probated in 1899, and the second was offered for probate in 1903, after the period to appeal from the first probate had passed. Defendant's demurrer was sustained. *Held*, since the second will expressly revoked the first one, its approval would necessarily revoke the decree approving the first one, and the probate court has no power to set aside its decrees; by statute and decision, the decrees may be set aside only on appeal; otherwise a decree could be set aside long after the period to appeal has expired. (Appeal to United States Supreme Court dismissed for want of jurisdiction, 199 U. S. 602, 26 S. Ct. 748.)

Folwell v. Howell, 117 Conn. 565, 169 A. 199 (1933) did not involve two wills, but is important in connection with the *Delehanty* case. It was an action for damages and equitable relief for fraud in securing probate of a will. The time for appeal from probate had passed, and plaintiff showed lack of laches. Defendant's demurrer was overruled. *Held*, equity has power to relieve against fraud, but

the probate court could not give relief under the ruling of *Delehanty v. Pitkin*.

The *Delehanty* case has been cited many times for the proposition that the probate court cannot set aside its decrees, and is apparently still good authority.

Florida. By statute, a later will may be offered for probate pending probate proceedings. This presumably coincides with the period for contest (termed revocation of probate in the statute), which may be made at any time before final discharge of the representative. In case of a will discovered after the termination of administration, a trust may be impressed on the property, but only to the extent that it remains in its original form or may be traced, and proceedings for this purpose must be brought within three years after the discharge of the personal representative.

Fla. Stat. Ann. (1941) § 732.32. "Upon the discovery, pending probate proceedings, of a later will or codicil expressly revoking the probated will or impliedly revoking the same in whole or in part, any person interested may by petition offer same for probate. The proceedings shall be, as nearly as practicable, similar to those for revocation of probate generally." (Under § 732.30, proceedings for revocation of probate may be brought at any time before final discharge of the personal representative.)

§ 732.33. "Upon the discovery, after the termination of administration or probate proceedings and the discharge of the personal representative, of an unknown will or a later will or codicil expressly revoking the probated will or impliedly revoking the same in whole or in part, any one or more persons interested may, by bill in chancery impress a trust upon the funds or property received by an heir, legatee or distributee in the administration or probate proceedings recently terminated which, because of the newly discovered will, such recipient is not justly entitled to retain. . . . Nor shall any such proceeding be brought after three years after the discharge of the personal representative."

Georgia. By statute, probate in common form becomes conclusive after seven years, and it has been held that this bars probate of a later will after seven years have elapsed. As for probate in solemn

form, it is provided by statute that proceedings to set aside judgments or decrees must be commenced within three years. It has been held that the three-year limitation applies to a proceeding to set aside a probate in solemn form for fraud, and probably it would also be held to prevent probate of a later will after three years from probate of the earlier one in solemn form.

Ga. Code Ann. (1936) § 113-605. "Probate in common form shall become conclusive upon all parties at interest after the expiration of seven years from the time of such probate, except minor heirs at law who require proof in solemn form and interpose a caveat within four years after arrival at age. . . ."

§ 3-702. "All proceedings of every kind in any court of this State to set aside judgments or decrees of the courts, shall be made within three years from the rendering of said judgments or decrees."

Skinner v. Phillips, 142 Ga. 405, 83 S. E. 121 (1914). The first will was probated in common form in 1889, and the second will was offered in 1912, together with an application to revoke the first probate. The proponent attained his majority within four years before this proceeding, but was not an heir of testator. *Held*, proponent is not within the saving clause of the statute, for that clause is limited to minor heirs; therefore the proceeding is barred by the statute of limitations.

Speer v. Speer, 74 Ga. 179 (1885) does not involve a later will, but holds that an action to set aside probate in solemn form for fraud must be started within three years, under § 3-702. But see *Walden v. Mahnks*, 178 Ga. 825, 174 S. E. 538 (1934), which holds that § 3-702 does not prevent probate of a will ten years after an administrator was appointed on the supposition that the estate was intestate.

Illinois. A later will can be probated after expiration of the period to contest on a showing that its existence was not known or was concealed.

Conzet v. Hibben, 272 Ill. 508, 112 N. E. 305 (1916) was an attempt to have the later will probated two and one-half years after probate of the first will. Proponents gave no reasons for the delay, nor did they make any claim of fraud or mistake. Contestants in their pleading argued the statute of limitations for contest of the first will, but the court does not decide this point. *Held*, probate is denied because

proponents were parties to and assented to probate of the first will; they are estopped unless they can show fraud or mistake, and they have not done this.

Abdill v. Abdill, 295 Ill. 40, 128 N. E. 741 (1920) involved a codicil which was offered for probate over two years after probate of the will. The proponent alleged in his petition that he did not know of its existence earlier, and testified fully as to the circumstances of finding it. He also alleged that if the other heirs knew of its existence they were guilty of fraud against him. *Held*, the codicil is admitted to probate; in view of the positive proof of his ignorance of its existence he is entitled to probate; if everyone was ignorant, the will was probated by mistake, and if others knew of it, there was fraud; it is immaterial that the time for contesting the will has expired.

Oliver v. Oliver, 313 Ill. 612, 145 N. E. 123 (1924). The first will was probated in 1908, but was of no effect as to the land in question since the devisee of the land was a subscribing witness. In 1910 there was litigation in equity between the various heirs to have deeds to this land, made by decedent, set aside. It was so decreed and an intestacy declared. Now, in 1921, a later will was offered with full explanations of ignorance of its existence. Holding that the will should be admitted to probate, the court concluded that the requirements of *Conzet v. Hibben* had been met; the litigation in the chancery court is no bar, for probate is not an attack on that decree; a will may be probated at any time, regardless of probate of a prior will or of intestate administration. (The latter will was contested after this decision, and set aside as a forgery. *Oliver v. Oliver*, 340 Ill. 445, 172 N. E. 917 (1930).)

Austin v. First Trust & Savings Bank, 343 Ill. 406, 175 N. E. 554 (1931). In this case a codicil was offered five years after the will, with allegations that it was not offered sooner because the proponent had thought he could claim under it as a gift causa mortis. The main issue in the case involves the question of election of remedies and whether the instrument is a codicil; it is also held, however, that the proponent is not barred by lapse of time, the court saying that there is no time limit on the probate of a codicil to a will.

See, also, *In re Estate of King*, 310 Ill. 90, 141 N. E. 416 (1923).

Indiana. A later will cannot be probated after the period for contest has expired.

Bartlett v. Manor, 146 Ind. 621, 45 N. E. 1060 (1897). A later will was offered for probate thirty years after probate of the earlier one, the reason for delay being fraudulent concealment by the devisee under the earlier will: *Held*, probate is denied; an essential part of the case is the overthrow of the first will, and therefore it is a contest of the first will, and must be brought within the time provided by statute for contest after probate.

Kansas. A statute sets out the procedure for probate of a later will but makes no mention of the time element. However, the section probably means that a later will may be probated after the period to appeal has expired. But no will may be offered for probate after one year from decedent's death, except in cases of fraud, when the limitation is five years from decedent's death.

Kan. Gen. Stat. (Supp. 1943) § 59-2226. "If, after a will has been admitted to probate, a later instrument in writing purporting to be the last will or codicil shall be presented, proceedings shall be had for the probate thereof. . . ."

§ 59-617. "No will of a testator who died while a resident of this state shall be effectual to pass property unless an application is made for the probate of such will within one year after the death of the testator, except as hereinafter provided." (See also § 59-803, protecting bona fide purchasers from heirs of a nonresident unless a will is offered within one year from testator's death.)

§ 59-618. " . . . [A will which has been knowingly withheld] may be admitted to probate as to any innocent beneficiary on the application by him for such probate, if such application is made within ninety days after he has knowledge of such will and access thereto and within five years after the death of the testator. . . ."

As to the time limitation of § 59-617, *In re Colyer's Will*, 157 Kan. 347, 139 P. (2d) 411 (1943) *held*, on an appeal from a denial of probate, that this section is not subject to exceptions, and that the court cannot admit a will which is not offered within one year from death.

In general, see 2 *Bartlett, Kansas Probate Law and Practice* (1939) § 1078.

Kentucky. By statute, a later will may be offered within twenty-five years after testator's death.

Ky. Civ. Code (1938) § 518. "The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it— . . .

"9. When any paper purporting to be the last will of any person has been, or may be hereafter admitted to probate, and a later will has been discovered. A judgment on this ground, however, shall not be vacated or modified, unless proceedings to that end shall be instituted within twenty-five years after the death of the testator. . . ."

The cases under this statute concern the proper procedure, and do not involve any question of passage of time. See *Rubarts v. Rubarts*, 255 Ky. 695, 75 S. W. (2d) 353 (1934); *Anderson's Adm'x v. Bourbon Bank*, 265 Ky. 157, 96 S. W. (2d) 257 (1936); *Vaughan's Admr. v. Vaughan*, 271 Ky. 387, 111 S. W. (2d) 1037 (1937); *Polley v. Cline's Exr.*, 272 Ky. 147, 113 S. W. (2d) 1133 (1938).

A case prior to the above statute is *Couchman v. Couchman*, 104 Ky. 680, 47 S. W. 858, 44 L. R. A. 136 (1898), in which a codicil was probated shortly after the will was probated, and on appeal from probate of the codicil it was held that it could not be probated because it revoked the will, and the probate court has no power to set aside its decrees. The proper procedure was said to be an appeal to the circuit court from the probate of the will, as provided by statute, within five years after probate.

Maine. Probate courts have jurisdiction to set aside probate of an earlier will and admit a later one, but no case has presented the question of what showing must be made.

Cousens v. Advent Church, 93 Me. 292, 45 A. 43 (1899). Bill in equity against the recipient of benefits under the first will, by a beneficiary under the later will, to obtain payment of his legacy. Plaintiff alleged that he learned of the later will too late to bring a writ of error from the probate of the first will. The theory of the bill is that there is no authority in the probate court to correct its decrees. Defendant's demurrer was held properly sustained. Wills do not become operative until proved, and the probate court is the only court which can probate wills; probate courts have inherent power

to set aside their decrees if the will is found to be a forgery or a later will is discovered, or testator proves to be alive.

See, also, *Tripp v. Clapp*, 126 Me. 534, 140 A. 199 (1928) which reaches the same conclusion.

Maryland. There have been no cases on the question whether a later will may be probated, but a dictum in one case indicates that the statute of limitations for a caveat or other objection to a probated will is applicable to any proceeding affecting the validity of a will.

Md. Code (1939) art. 93, § 357. "No will, testament, codicil or other testamentary paper shall be subject to caveat or other objection to its validity after the expiration of one year from its probate."

Garrison v. Hill, 81 Md. 551, 32 A. 191 (1895) holds that this statute has no retroactive effect, but the court assumes that it would otherwise bar proceedings to revoke a probate. The case did not involve two wills.

Clagett v. Hawkins, 11 Md. 381 (1857), decided before the enactment of the above statute, has sometimes been cited in discussions of the problem, but it does not involve two wills. It holds that probate may be revoked in an independent action after the period to appeal from the probate has expired, where it is shown that the will was never executed and that the testator did not intend it to be his will. In view of the above statute, this case is of doubtful value as authority.

Massachusetts. A later will may be probated after the period for appeal has expired, but probably only on a showing of fraud or mistake which would permit reopening of an ordinary judgment.

The only case directly in point is *Waters v. Stickney*, 12 Allen (94 Mass.) 1, 90 Am. Dec. 122 (1866). In this case a codicil was written on the back of the paper containing the will, but it was overlooked when the will was probated. It was apparently an oversight of the court, since the letters testamentary referred to both will and codicil. The codicil was presented for probate some fourteen years later. *Held*, the codicil may be probated although the time for appeal from the probate of the will has passed, for the probate court has inherent power to set aside its judgments for fraud or mistake. The court is mainly concerned with the power to set aside judgments, and assumes that the statute of limitations does not affect the case. This case is often cited in Massachusetts for the proposition that a probate

court may revoke its decrees for fraud or mistake, the most recent being *O'Sullivan v. Palmer*, 312 Mass. 240, 44 N. E. (2d) 958 (1942), but none of these cases involves the two-will situation.

Mass. Ann. Laws (1932) c. 192, § 3, provides that a probate decree is conclusive after one year as to bona fide purchasers, executors, etc., but provides further for certain liabilities in case a subsequent decree reverses or qualifies the original decree. This seems to indicate that the court is still deemed to have the power to set aside its decrees, and *Waters v. Stickney* is therefore still in force. But *Newhall, Settlement of Estates and Fiduciary Law in Massachusetts* (3d ed., 1937) § 20, discussing the power to set aside probate court judgments, states that there is "a very marked stiffening in the attitude of the court since 1891, when the probate courts were made courts of superior jurisdiction," citing *McLaughlin v. Feerick*, 276 Mass. 180, 176 N. E. 779 (1931). This case sets out three bases for revoking probate decrees: error, fraud going to the jurisdiction of the court, and fraud which deprives an interested party of his day in court.

Mass. Ann. Laws (1932) c. 193, §§ 4 and 5, which place a limitation of twenty years from death of a testate or intestate decedent on the original grant of administration, do not affect the two-will situation, since by their terms they apply to *original* administration.

Michigan. The probate court has no power to set aside its decrees, and therefore lacks jurisdiction to probate a later will which would annul the first probate.

In *re Butts' Estate*, 173 Mich. 504, 139 N. W. 244 (1913) involved a petition to probate the later will over thirty years after probate of the earlier one, with allegations that the first will had been probated under a mistaken impression that it was the later one. The estate was still in process of administration. *Held*, in this state the probate court has no power to vacate its orders and decrees, and since probate of the second will would necessarily revoke the first probate, the probate court cannot entertain the petition; chancery has jurisdiction in cases of fraud, accident and mistake, and petitioner's only forum, if any, is in chancery. The passage of time is not mentioned.

Mississippi. No authority found on issue of passage of time; but see *Mims v. Johnson*, 129 Miss. 403, 92 So. 577 (1922).

Missouri. By statute, no will may be offered for probate more than one year from the first publication of notice of granting letters testamentary or of administration. In most cases this will coincide with the period for contest, which is one year from date of probate. It has been held that the period cannot be extended for fraud.

Mo. Rev. Stat. Ann. (1942) § 532. “ . . . No proof shall be taken of any will nor any certificate of probate thereof issued, unless such will shall have been presented to a probate court . . . within one year from the date of the first publication of the notice of granting letters testamentary or of administration that may have been granted by any probate court in the state of Missouri, on the estate of the testator or named in such will so presented.”

(Under § 538 (Supp. 1944) the period to contest probate is one year from the date of probate.)

Breeding v. Pack (Mo., 1942) 164 S. W. (2d) 929, holds that suit may not be brought in the circuit court to revoke probate of an earlier will and establish a later one. The proper procedure is to offer the later will for probate in the probate court.

State ex rel. Bier v. Bigger, 352 Mo. 502, 178 S. W. (2d) 347 (1944) was a mandamus proceeding to force the probate judge to hear a petition for probate of a will. Letters of administration on the estate had been issued Dec. 26, 1941, notice being published Jan. 9, 1942. The will was not offered for probate until Sept. 15, 1943, and allegations were made that the will had been fraudulently suppressed by the administrator. Petitioner claimed § 532 did not apply in cases of fraud. The petition was dismissed. *Held*, where a statute of limitations is a special one, not included in the general chapter on limitations, the running of it cannot be tolled for any reason not set out in the statute; § 532 is such a special statute, and does not authorize the time to be extended for any reason.

Nebraska. A codicil was admitted to probate after the time for appeal in one case, but the time element was not an issue in the case.

In *re Estate of Bremer*, 141 Neb. 251, 3 N. W. (2d) 411 (1942). A codicil, which was written on the back of the will, was presented for probate some eleven months after probate of the will. The issue was whether the codicil could be admitted to probate without first

vacating the probate of the will. *Held*, it may be admitted without first vacating the prior decree, "in consideration of the jurisdiction vested in the county court, coupled with the facts, that there was no fraud shown nor want of diligence, and the mistake . . . was inadvertently made, . . . and the codicil was presented for probate within the time when no statutory provision would bar it." (The statute then in force, Comp. Stat. (1929) § 30-1602, provided a thirty-day period for appeal, but the court does not refer to this statute.)

Cf. *Williams v. Miles*, 63 Neb. 859, 89 N. W. 451 (1902).

Nevada. By statute, probate of a later will is not within the limitation period for contests.

Nev. Comp. Laws (Supp. 1941) § 9882.27. "Failure to contest a will does not preclude the subsequent probate of a will executed later in point of time than the one heretofore admitted to probate."

New York. By statute, a later will may be probated after probate of an earlier one, and the former letters must be revoked by the decree granting probate. There seems to be no litigation involving a time limit for such proceedings.

N. Y. Surr. Ct. Act, § 154. "Where, after letters of administration, on the ground of intestacy, have been granted, a will is admitted to probate, and letters are issued thereupon; or where a subsequent will is admitted to probate and letters are issued thereupon; the decree granting probate must revoke the former letters."

The leading case on probate of a later will is *Campbell v. Logan*, 2 Bradf. Surr. 90 (1852), which holds that the probate of the first will may be set aside, and is not conclusive against probate of a later one. The second will was offered one week after probate of the first one.

In *re Lyman's Will*, 14 Misc. 352, 36 N.Y.S. 117 (1895) involved a will offered eighteen years after probate of the first one. Probate was denied on the basis of estoppel because of acceptance of benefits under the earlier will with knowledge of the existence of the later one, and also for lack of due execution. There was no discussion of the lapse of time, and it apparently did not concern the court.

A later will was admitted nearly a year after the earlier one in *In re Shaver's Estate*, 133 Misc. 112, 231 N. Y. S. 596 (1928)

(affirmed without opinion in 227 App. Div. 646, 235 N. Y. S. 882). The court did not question its power to admit the later will; the sole issue was forgery.

In *re Snediker's Will*, 174 Misc. 209, 20 N. Y. S. (2d) 223 (1940) involved a petition for probate of a second will, filed the day after probate of the first one. A motion to dismiss on the ground that the probate decree was a bar, was denied. *Held*, *Campbell v. Logan*, 2 Bradf. Surr. 90, decided the point, and is still the law; there would be no advantage in disturbing the decree until a decision is made on the second will, and if the second one is probated the former letters will be revoked, under Surr. Ct. Act, § 154.

North Carolina. By statute, a later will may be proved and the original letters testamentary revoked. This statute indicates that a later will may be probated at least while administration is pending.

N. C. Gen. Stat. (1943) § 28-31. "If, after the letters of administration are issued, a will is subsequently proved and letters testamentary are issued thereon; or if, after letters testamentary are issued, a revocation of the will or a subsequent testamentary paper revoking the appointment of executors is proved and letters are issued thereon, the clerk of the superior court must thereupon revoke the letters first issued. . . ."

North Dakota. By statute, discovery of a later will is one of the grounds for a contest after probate, and proceedings are governed by the contest statute.

N. D. Rev. Code (1943) § 30-0608. "When a will has been admitted to probate, any person interested therein, at any time within one year after such probate, may contest the same. . . . For that purpose he must file in the court in which the will was proved a sworn petition in writing containing his allegations that evidence discovered since the probate of the will . . . shows:

"1. That a will of the decedent, of later date than the one proved, revoking or changing the former will, has been discovered and is offered. . . ."

Ohio. By statute, a later will may be probated in the same manner as if no earlier will had been probated. The cases indicate that probate of the later will is not limited by the period for contest of the earlier one.

Ohio Gen. Code (Page, 1937) § 10504-27. "When a will . . . has been admitted to probate or to record, and a will of later date . . . is presented to the same court for probate or record, . . . it shall have the same authority to admit the later copy to probate or to record that it would possess if no earlier will . . . had been so admitted. In such case, the proceedings shall be the same as if no other will of the party ever had been proved or recorded."

Stafford v. Todd, 17 Ohio App. 114 (1921) was an action to enjoin proceedings for probate of the later will after the period to contest had expired. Defendant's demurrer was sustained, the court saying that the above statute gave authority for such proceedings in spite of lapse of time.

Oklahoma. By statute, discovery of a later will is one of the grounds for a contest after probate, and proceedings are governed by the contest statute.

Okla. Stat. (1941) t. 58, § 61. "When a will has been admitted to probate, any person interested therein may at any time within one year after such probate, contest the same. . . . For that purpose he must file in the court in which the will was proved a sworn petition in writing containing his allegations, that evidence discovered since the probate of the will . . . shows:

"1. That a will of a later date than the one proved by the decedent, revoking or changing the former will, has been discovered, and is offered. . . ."

Oregon. In one case probate was revoked because of the existence of a later will, though this will was not offered for probate. Lapse of time was not at issue in this case. See *Melhase v. Melhase*, 87 Ore. 590, 171 P. 216 (1918).

Pennsylvania. It would seem that a later will must be presented within the time to appeal from probate of the first will, unless a recent lower court decision represents a new trend in its holding that probate of the earlier will is like forgery, which may be proved after the period to appeal from probate has elapsed.

Cochran v. Young, 104 Pa. St. 333 (1883). Ejectment, by a devisee under a codicil against the purchaser of a devisee under the will. The will was probated in 1862, and the codicil was probated in 1881. The present action was brought in 1882. Judgment was

for the defendant. *Held*, by statute, a probate is conclusive unless those interested to controvert it should contest it within five years; this is not merely a statute of limitations, but is a provision for greater certainty of title, and lays down a rule of evidence; the probate of the will becomes conclusive after five years, and the codicil cannot now be used to upset the validity of the will; even if there was fraud in withholding the codicil, it is unavailing against the defendant, a bona fide purchaser.

Baker's Estate, 244 Pa. 350, 90 A. 655 (1914) is not directly in point. The first will was probated, and the time for appeal had passed. A codicil was probated at the same time, and this is an appeal from probate of the codicil. The evidence shows that there was a will later than the one probated, and that the codicil was intended as a codicil to this later will. *Held*, the codicil cannot be probated because it related to another will than the one which was probated, and since the probate of the will has not been appealed from during the statutory period, it could not be superseded by the later will.

Sebik's Estate, 300 Pa. 45, 150 A. 101 (1930). A later will was offered for probate two and one-half years after probate of the first will. Probate was denied by the register, and the case is affirmed on appeal. *Held*, the probate of the first will can only be set aside on appeal, and if on such appeal it is decided that the later will is in fact the last will, an appropriate order will be made to the register to admit it to probate; the proper procedure is appeal from probate of the first will; the statute providing that a last will may be offered for probate at any time does not apply, since there is an adjudication that the earlier instrument is the last will.

See, also, *Crawford v. Schooley*, 217 Pa. 429, 66 A. 743 (1907).

But see *Hetzel's Estate*, 37 D. & C. 440 (1939). The second will was offered for probate but the petition was dismissed, under procedure as outlined in *Sebik's Estate*. An appeal was filed two years and two months after probate of the first will. *Held*, appeal is proper; the purpose of the statute of limitations is to protect titles of bona fide purchasers, and not to prohibit the probate of a last will offered after the expiration of a time limit. "The present case raises no question of title in the hands of an innocent purchaser. Only the rights of legatees are involved. . . . There has been no ad-

vertisement of letters, no inventory filed, no administration conducted, no transfers of property, nor any account filed. . . . Every will probated which is not the last will is as much a fraud upon the register as the forgery was in Culbertson's Estate, 301 Pa. 438."

Culbertson's Estate, 301 Pa. 438, 152 A. 540 (1930) involved a forged will, and the court set aside its probate twelve years after probate, on the twofold ground that there was extrinsic fraud, and that the will was void and the order admitting it to probate was equally void. See, also, Lowry's Estate, 26 D. & C. 200 (1936), holding that it is in the discretion of the court to allow an appeal after the statutory period has elapsed where fraud is claimed. See, also, Roberts' Estate, 309 Pa. 389, 164 A. 57 (1932), which denies relief from probate of a forged will twenty years after probate, on the ground of laches.

See, also, Wall v. Wall, 123 Pa. 545, 16 A. 598, 10 Am. St. Rep. 549 (1889), where plaintiff in an ejectment action was able to set aside the probate after more than thirty years had elapsed, because the will was never executed. The court says this goes to the jurisdiction of the court; the register cannot make a will out of something which is not a will. But see Broe v. Boyle, 108 Pa. St. 76 (1884), holding that after the period to appeal has expired, a will cannot be set aside on the ground that it was revoked by marriage of the testatrix, although by statute marriage of a woman revoked her will.

Rhode Island. A later will may be admitted to probate after the time for appeal from the first probate has passed.

Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 49 (1858). The first will was probated in Rhode Island in 1854. A later will was probated in New York the same year, and its decision was affirmed by the New York supreme court in 1857. A duly authenticated copy of the later will and the New York decree were presented in Rhode Island, and probate denied. On motion for a new trial, *held*, a new trial must be granted. After first deciding that the full faith and credit clause does not require recognition of the New York decree, the court holds that the later will can be probated without first revoking the first probate; the probate courts have power to revoke their decrees; "else, if probate of a will be granted, and the time of appeal be passed, inasmuch as their jurisdiction is exclusive, there would be

no mode in which a later will of the testator, subsequently found, could be proved, without the inconvenience of having out, at the same time, conflicting authorities, issuing from the same source, and with regard to the settlement of the same estate."

Merrill v. Boal, 47 R. I. 274, 132 A. 721, 45 A.L.R. 830 (1926). This was a petition for probate of an instrument in the form of a trust deed; the petition was filed after the time for appeal from probate of the will had passed; the will referred to the trust deed. *Held*, citing the *Bowen* case, the court has power to probate a supplemental instrument which should have been probated with the will.

South Carolina. It has been held that equity has no jurisdiction to admit a later will. There is no authority on the power of the probate court to do so.

Myers v. O'Hanlon, 12 Rich. Eq. 196 (1861). Bill in equity twenty-two years after probate of the first will, to set aside the probate and to set up a later will. The bill was dismissed. *Held*, equity has no such jurisdiction.

South Dakota. By statute, discovery of a later will is one of the grounds for a contest after probate, and proceedings are governed by the contest statute.

S. D. Code (1939) § 35.0306. "When a will has been admitted to probate, any person interested therein may, at any time within one year after such probate, contest the same. . . . For that purpose he must file in the court in which the will was proved a sworn petition in writing alleging that evidence, discovered since the probate of the will . . . shows:

"1. That a will of a later date than the one probated, revoking or changing the former will, has been discovered and is offered. . . ."

Tennessee. There are no cases in which the passage of time was an issue, and the very absence of such an issue indicates that the later will may be offered at any time. It has been held that probate of the later will is not a collateral attack on the first probate, and in one case the second will was probated twenty-three years after probate of the first will.

Murrell v. Rich, 131 Tenn. 378, 175 S.W. 420 (1914) came up on a contest of the later will; it is not clear how much time had passed after probate of the first one. One of the grounds of contest of

the second will is that its probate constitutes a collateral attack on the probate of the first will, and that the first probate must be revoked before the second can be probated. *Held*, the first probate need not be revoked, for the second probate is not a collateral attack. Even if the effect of the second will is to annul the first one, there is no objection.

In *Fransioli v. Podesta*, 175 Tenn. 340, 134 S.W. (2d) 162 (1939) the first will was probated in 1933, and the second one was offered in 1936. The second one was holographic, and probate was denied because it was not found among decedent's valuable papers, as required by statute; the present proceeding was begun in 1938 to have it probated as a codicil. The sole issue is whether the 1936 proceeding constitutes *res judicata*. *Held*, it does not, and the will may be probated. The time element is not mentioned.

In *Hudson v. Hudson*, 2 Tenn. App. 535 (1926) the later will was offered two years after probate of the first one. It was admitted, and again no mention was made of the passage of time. The main issue was estoppel.

Seilaz v. Seilaz, 24 Tenn. App. 611, 148 S.W. (2d) 23 (1940) was a case for construction of the second will, and is important here only because the statement of facts indicates that the second will was probated twenty-three years after the first one.

Texas. There is no direct authority on the question of lapse of time, but probably a later will may be offered at any time.

Vance v. Upson, 64 Tex. 266 (1885). The second will was offered within ten months after probate of the first one. The limitation period for contest is not stated, although one statement in the opinion indicates that it is one year. On defendant's demurrer on the ground that the later will cannot be probated until the first probate is revoked, the demurrer was overruled. *Held*, the court has jurisdiction to admit the last will of the decedent, and it would be pointless to require revocation of the first probate before the second can be probated, and then perhaps discover that the second will does not operate to revoke the first.

Richardson v. Ames (Tex. Civ. App., 1928), 2 S.W. (2d) 517, was an attempt to set aside a probate obtained in 1921 on the ground of revocation of the will by a later will. Apparently there is no effort to probate the later will. It was held that execution of the later will

was not proved, and hence could have no effect on the earlier one. The case is important only because of its assumption that proof of a later will could operate to revoke probate of the earlier one.

Virginia. A later will may be probated after the period for impeaching the earlier will in equity has expired.

Schultz v. Schultz, 10 Gratt. (51 Va.) 358, 60 Am. Dec. 335 (1853) is a leading case, and is often cited for the proposition that a later will may be offered after the period to contest has expired. The statute gave seven years to contest, providing that if not contested in that time the probate is forever binding; there was a saving clause in favor of persons out of the state. The first will was probated in 1830, and the second was offered for probate in 1845. The proponent was within the saving clause of the statute. Probate was denied in 1845, whereupon the same proponent began proceedings in equity for revocation of the first probate. He was successful in this action, and then obtained probate of the second will. The present case is an appeal from the decree revoking probate of the first will and from the probate of the second will. After deciding that the saving clause of the statute was applicable, the court held that the denial of probate in 1845 was a judgment on the merits, and that it was not necessary to revoke the first probate before the second will could be probated. That is, the probate court had jurisdiction over the probate of the second will, and its decision denying probate is forever binding because not contested within seven years. Therefore the later proceedings were void.

(It would seem that this case does not hold that a later will may be admitted at any time. In view of the fact that the proponent was within the saving clause of the statute of limitations for contest, there could be no question of his right to present the second will. That is, the period to contest had not expired. It would seem that if the case holds anything beyond the holding that proponent was within the saving clause, it holds merely that the decision on the later will is binding even though the probate of the first will was not first revoked.)

In *re Will of Bentley*, 175 Va. 456, 9 S.E. (2d) 308 (1940). The second will was offered five years after probate of the first one; no reasons for the delay are given. The statute then in force (Code,

1930, § 5259) gave two years to bring a suit in equity to impeach the will. It was contended that the statute barred probate of the second will, but *held*, the later will may be admitted because it is not an attack on the judgment of probate of the earlier will; the court relies on *Schultz v. Schultz*, saying that that case holds that a later will may be admitted at any time. There is a strong dissenting opinion, which points out that the only real holding of the *Schultz* case was that the limitation period did not apply because proponent was within the saving clause of the statute, and therefore all other questions in the case are moot and the rest of the opinion dictum.

Washington. Probate of the later will is not a contest of the earlier one, and the probate court has inherent power to set aside its former decree, at least while the estate is still open.

In *re Elliott's Estate* (Wash., 1945) 156 P. (2d) 427. The second will was offered for probate after the period for contest of the first will had elapsed. *Held*, the second will is admitted to probate; it does not constitute a contest of the prior will within the meaning of the contest statute, and a court of probate has inherent authority at any time, while an estate is still open, to set aside its decrees and to admit to probate a later will than that theretofore probated.

§§ 76-78. PRODUCTION OF WITNESSES FOR PROBATE

The rule that attesting witnesses to a document must be called in preference to other witnesses is probably too well settled to require discussion here. See 4 Wigmore, *Evidence* (3d ed., 1940) §§ 1287-1321. A greater problem arises regarding the number of such witnesses which must be called. Two witnesses were apparently necessary to prove a will of personalty in solemn form in the English ecclesiastical courts, but a will of realty could be proved in the common law courts on the testimony of only one witness. Wigmore, *Evidence* (3d ed., 1940) §§ 1304, 2048, 2049. In view of the fact that ecclesiastical courts were not known in this country, the English common-law rule presumably applies in American courts unless it has been changed by statute. As to the necessity of producing all the subscribing witnesses, see 2 Page, *Wills* (3d ed., 1941) § 744. Generally, see 2 Woerner, *Administration* (3d ed., 1923) §§ 216-218.

Many of the states have statutes on the subject; these statutes will be discussed in this note. The word *witness* will be used to mean *attesting witness*.

Perhaps the most common type of statute permits an uncontested will to be proved by only one witness if he testifies to the essential requirements of execution, but requires all of the available witnesses to be produced and examined if the will is contested. Ariz. Code (1939) §§ 38-209, 38-212; Cal. Prob. Code Ann. (Deering, 1944) §§ 329, 372; Idaho Laws Ann. (1943) §§ 15-211, 15-216; Minn. Stat. (1941) § 525.24; Mont. Rev. Code (1935) §§ 10030, 10035; Nev. Comp. Laws (Supp. 1941) §§ 9882.17, 9882.19; N. D. Rev. Code (1943) §§ 30-0511, 30-0604; Okla. Stat. (1941) t. 58, §§ 30, 43; S. D. Code (1939) §§ 35.0209, 35.0303; Tenn. Code (Michie, 1938) §§ 8102, 8108; Utah Code (1943) § 102-3-8; Wyo. Rev. Stat. (1931) §§ 88-218, 88-605. A similar result is reached in Georgia and South Carolina, where proof in common form may be made by one witness, while all the witnesses are required for proof in solemn form. Ga. Code Ann. (1936) §§ 113-601, 113-602; S. C. Code (1942) § 8932.

A few other states provide simply that an uncontested will may be proved by one attesting witness, but make no provision for the case of the contested will. Ala. Code (1940) t. 61, § 39; Me. Rev. Stat. (1944) c. 141, § 7; Mich. Stat. Ann. (1943) § 27.3178(92); Neb. Rev. Stat. (1943) § 30-218; Vt. Pub. Laws (1933) § 2764; Wis. Stat. (1943) § 310.06. New Hampshire achieves the same result by providing that probate in common form may be had on the testimony of only one witness, but the statute is silent as to probate in solemn form. N. H. Rev. Laws (1942) c. 351, § 6. By implication, one witness would not suffice in these states if the will is contested, and cases in at least some of these jurisdictions have so held. See cases cited in 4 Wigmore, Evidence (3d ed., 1940) 607, footnote 6. A few states require only one witness without reference to whether there is a contest. Ala. Code (1940) t. 61, § 39 ("one or more of the subscribing witnesses") (but the same section also provides explicitly that one witness suffices if there is no contest); Fla. Stat. Ann. (1941) § 732.24 ("any attesting witness"); Ind. Stat. (Burns, 1933) § 7-407 ("one or more of the subscribing witnesses"); Miss. Code (1942)

§ 498 ("at least one of the subscribing witnesses"); Tex. Civ. Stat. Ann. (Vernon, Supp. 1945) art. 3344 ("one of the subscribing witnesses"). The Massachusetts statute, after providing that an uncontested will may be proved by one witness, continues with a unique provision that "if the probate of such instrument is assented to in writing by the widow or husband of the deceased, if any, and by all the heirs at law and next of kin, it may be allowed without testimony." Mass. Ann. Laws (1932) c. 192, § 2.

Some states require the testimony of two witnesses or all the witnesses regardless of whether or not there is a contest. Colo. Stat. (1935) c. 176, §§ 55, 56; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 221; Iowa Code (1939) § 11866 ("the subscribing witnesses"); Kan. Gen. Stat. (Supp. 1943) § 59-2224; Md. Code (1939) art. 93, § 365; N. M. Stat. (1941) § 32-209 ("the attesting witnesses"); N. Y. Surr. Ct. Act, § 141; N. C. Gen. Stat. (1943) § 31-18; Ohio Gen. Code (Page, 1937) § 10504-18 ("the witnesses"); Pa. Stat. Ann. (Purdon, 1930) t. 20, § 191.

It should be noticed that most statutes merely require that the specified number of witnesses be called and examined, and do not require that all of them be able to prove the execution of the will. See 7 Wigmore, Evidence (3d ed., 1940) §§ 2048, 2049 for a discussion of the difference between these two rules. It is there stated that Pennsylvania is the only state requiring the *proof* of two witnesses. The Pennsylvania statute has been so interpreted in *Hock v. Hock*, 6 Serge. & R. 47 (1820); *McClure v. Redman*, 263 Pa. 405, 107 A. 25 (1919). Statutes in at least two other states, however, are susceptible of a similar interpretation. In Colorado, the will shall be allowed if it appears "by the testimony of two or more of the subscribing witnesses" that it was properly executed. Colo. Stat. (1935) c. 176, § 56. And in Tennessee, a contested will "shall be proved by all the living witnesses." Tenn. Code (Michie, 1938) §§ 8102, 8108.

Most of the states provide for the use of depositions of absent witnesses, and for the use of secondary evidence when the witnesses are unavailable. The only important point of divergence in this connection concerns the territorial limits beyond which an attesting witness is excused from attending. In some states a witness who is not in the county need not appear, e.g., Tex. Civ. Stat. Ann. (Vernon,

Supp. 1945) art. 3344, while in other states any witness within the state must be produced, e.g., Mich. Stat. Ann. (1943) § 27.3178(93). A few states have indefinite language such as "without the reach of subpoena," Ore. Comp. Laws (1940) § 19-204; or "parts unknown," Fla. Stat. Ann. (1941) § 732.24. A few states employ a limitation in terms of distance from the court. Thus, in Arkansas and Kentucky a deposition may be used if the witness resides more than fifty miles away. Ark. Dig. Stat. (1937) § 14535; Ky. Rev. Stat. (1944) § 394.230. In Maine and Washington the distance is thirty miles. Me. Rev. Stat. (1944) c. 141, § 6; Wash. Rev. Stat. (1932) § 1381. In Nevada it is twenty-five miles, but in case of a contested will a witness within the county must be produced. Nev. Comp. Laws (Supp. 1941) §§ 9882.17, 9882.19.

§ 77. PROOF OF LOST AND DESTROYED WILLS

I. IN GENERAL

In the absence of statute, the fact that a will is lost, or is destroyed without the consent of the testator, does not prevent its probate, provided its contents are proved. See Atkinson, Wills (1937) 452. While it has been said that the ecclesiastical courts in England required two witnesses to prove the contents of such a will (see 2 Page, Wills (3d ed., 1941) § 708 and Swinburne, Wills (7th ed., 1793) 450), it would seem that this is of little significance, since the rule of the ecclesiastical courts was that any fact must be proved by two witnesses. 7 Wigmore, Evidence (3d ed., 1940) § 2045; 1 Williams, Executors (1st Am. ed., 1832) *196 (as to wills generally). In the United States, in the absence of statute, the rules for the proof of the contents of a will are substantially the same whether the will is lost or not. It is true, a number of cases state that "clear and satisfactory" proof is required, or by similar language indicate that something more than a mere preponderance of the evidence may be necessary (see cases collected in 126 A. L. R. 1139 at 1141), yet it is held that the contents need not be proved beyond a reasonable doubt. *Skeggs v. Horton*, 82 Ala. 352, 2 So. 110 (1886). Thus it may be said that the rule as to proof is the same as that applicable in the ordinary case, but the nature of the evidence is such, when the will is lost, that it must be received with caution.

Attention should be called to a rule laid down in a few early cases to the effect that a lost or destroyed will may be established in equity. To that effect are *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646 (1886); *Harris v. Tisereau*, 52 Ga. 153, 21 Am. Rep. 242 (1874); *Buchanan v. Matlock*, 8 Humph. (27 Tenn.) 390, 47 Am. Dec. 622 (1847); and see *Hall v. Gilbert*, 31 Wis. 691 (1873). This doctrine apparently arose from the rule which once obtained in English chancery permitting an heir or devisee of land to establish his title in that tribunal where the remedy at law of trespass or ejectment was inadequate. See *Boyse v. Rossborough*, Kay Ch. 71 (1853), 3 DeGex MacN. & G. 817 (1854); *Colclough v. Boyse*, 6 H. of L. Cases 1 (1857); Fourth Report of English Real Property Commissioners (1833) 34-37; Adams, *Equity* (8th ed., 1890) 248-250. A New York statute gives the supreme courts of that state a jurisdiction over lost and destroyed wills concurrent with the surrogate's court. See N. Y. Dec. Est. Law, §§ 200-204. In most of the states today, however, a lost or destroyed will is probated in the same tribunal as any other will. *Wachter v. Davis*, 215 Ala. 659, 111 So. 917 (1927); *Beatty v. Clegg*, 214 Ill. 34, 73 N. E. 383 (1905); *Harrell v. Harrell*, 284 Mo. 218, 223 S. W. 919 (1920); see, also, *Atkinson, Wills* (1937) 452. Indeed, this is expressly indicated by a number of statutes which provide for the probate of all wills in the same court and begin with a statement to the effect that an interested person may petition for the probate of a will "whether the same be in writing or nuncupative, in his possession or not, lost or destroyed, or beyond the jurisdiction of the state." See, for example, Cal. Prob. Code Ann. (Deering, 1944) § 323.

In general, as to the proof of lost and destroyed wills, see *Atkinson, Wills* (1937) § 186; 2 Page, *Wills* (3d ed., 1941) §§ 708-721; 7 Wigmore, *Evidence* (3d ed., 1940) §§ 2052, 2106; annotations in 34 A. L. R. 1304 and 126 A. L. R. 1139.

II. STATUTES IMPOSING SPECIAL REQUIREMENTS

In many states it has been felt that special requirements for the proof of missing wills should be established by legislation. In about half the states are found statutes on the subject, setting up more or less rigid requirements for the proof of such wills. For the most part

they make requirements as to the number of witnesses necessary to prove the contents, and many of them require proof of the time of destruction. The remainder of this note will be devoted to a discussion of the statutes. They are as follows:

Ariz. Code (1939) §§ 38-222 to 38-224; Ark. Dig. Stat. (1937) §§ 14560-14563; Cal. Prob. Code Ann. (Deering, 1944) §§ 350-352; Colo. Stat. Ann. (1935) c. 176, § 57; Fla. Stat. Ann. (1941) § 732.27; Ga. Code Ann. (1936) § 113-611; Idaho Laws Ann. (1943) §§ 15-230 to 15-233; Ind. Stat. (Burns, 1933) §§ 7-601 to 7-604; Kan. Gen. Stat. (Supp. 1943) § 59-2228; Me. Rev. Stat. (1944) c. 141, § 9; Mich. Stat. Ann. (1943) §§ 27.3178(95), 27.3178(96); Minn. Stat. (1941) §§ 525.26 to 525.262; Mont. Rev. Code (1935) §§ 10049-10052; Nev. Comp. Laws (Supp. 1941) §§ 9882.34 to 9882.36; N. Y. Dec. Est. Law, §§ 200-204; N. Y. Surr. Ct. Act, § 143; N. D. Rev. Code (1943) §§ 30-0517, 30-0518; Ohio Gen. Code (Page, 1937) §§ 10504-35 to 10504-40; Okla. Stat. (1941) t. 58, §§ 81-84; S. D. Code (1939) §§ 35.0211-35.0213; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3330, 3335, 3345, 3349; Utah Code (1943) §§ 102-3-25 to 102-3-27; Wash. Rev. Stat. (1932) §§ 1390-1391; Wis. Stat. (1943) § 310.10; Wyo. Rev. Stat. (1931) §§ 88-401 to 88-404. See also Ore. Comp. Laws (1940) § 19-202; S. C. Code (1942) §§ 733, 8978.

Fourteen states require that the will be proved "to have been in existence at the time of the death of the testator, or . . . fraudulently destroyed in his lifetime." These states are Arizona, Arkansas, California, Delaware, Indiana, Montana, Nevada, New York, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wyoming. This provision is undesirable. If the statute is literally construed and *actual* existence at the time of death is meant, it may prevent probate of an unrevoked will, since a lost or destroyed will which cannot be proved is in effect revoked, even though the revocation statute may not have been complied with. Again, if actual existence is meant, the doctrine of dependent relative revocation is virtually precluded in so far as that doctrine applies to cases in which testator destroyed the will, for necessarily such a will is not in existence at the time of testator's death. In *In re Kerckhof's Estate*, 13 Wash. (2d) 469,

125 P. (2d) 284 (1942) (noted in 41 Mich. L. Rev. 358), for example, testator destroyed his will under the mistaken impression that his sole legatee was also his sole heir, thinking that this legatee would take by intestacy. There were in fact several other heirs. The sole legatee sought to have the will probated, claiming that the revocation was conditional and hence within the doctrine of dependent relative revocation, but the court denied probate, holding that it could not be admitted as a lost will because the statute required actual existence at the time of testator's death.

In order to obviate these difficulties, some courts have interpreted "fraudulently destroyed in his lifetime" as meaning any unlawful destruction, even though done in good faith, so that the will may be established even when actual existence cannot be shown, by proving that it was "fraudulently" destroyed. *Rose v. Hunnicutt*, 166 Ark. 134, 265 S. W. 651 (1924); *In re Breckwoldt's Will*, 170 Misc. 883, 11 N. Y. S. (2d) 486 (1939). Another method of avoiding the pitfalls of a literal construction of the statute is to interpret "existence" to mean existence in contemplation of law rather than actual physical existence. Under this interpretation the second clause of the statute—fraudulent destruction—becomes superfluous, for perforce the will continues in legal existence even though fraudulently destroyed. The Minnesota court adopted the legal existence construction in *In re Estate of Havel*, 156 Minn. 253, 194 N. W. 633, 34 A. L. R. 1300 (1923). Subsequently the Minnesota statute was amended to conform to this holding, so that it now requires only proof that the will remained unrevoked. Minn. Stat. (1941) § 525.261.

Another approach to the problem is found in the Ohio statute. In that state a missing will may be probated if it was lost, spoliated or destroyed "subsequent to the death of such testator, or after he became incapable of making a will by reason of insanity, or before the death of such testator if testator's lack of knowledge of such loss, spoliation or destruction can be proved by clear and convincing testimony." Ohio Gen. Code (Page, 1937) § 10504-35. The Georgia provision is similar, permitting probate of a will "destroyed without the consent of the testator, or . . . lost or destroyed subsequent to the death of the testator." Ga. Code Ann. (1936) § 113-611. These statutes clearly make *actual* existence the criterion, with the alternative of prov-

ing that destruction before testator's death was without his knowledge. This form of statute has the virtue of avoiding the term "fraudulently destroyed," and for that reason probably does not present the same difficulties in proving a missing will which remains unrevoked, at least if testator did not know it was missing. But what of the case of dependent relative revocation? Or the case where testator destroyed the will under undue influence? The Ohio statute prevents probate in these and other cases in which the will is destroyed with testator's knowledge but not revoked. At the same time, however, the statute has the advantage of making testator's ignorance of the mere *loss* of the will (as distinguished from intentional destruction) a necessary part of the proof. For reasons already discussed, this presumably carries out the intent of the average testator.

As to proof of contents, the statutes require two credible witnesses in Arizona, Arkansas, California, Colorado, Idaho, Michigan, Montana, Nevada, New York, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wyoming; Florida requires two disinterested witnesses. This mandate is, of course, for corroborative purposes; but it may be questioned whether any definite number of witnesses should be required. The quality of evidence cannot be measured in terms of number of witnesses. In the final analysis it becomes a question of credibility of the witness, and credibility is neither aided nor defeated by a statutory requirement as to the number of witnesses. There may well be cases in which only one witness is available, yet this single witness may be of such credibility that no further proof is necessary, and none should be required. This situation is cured in part by a proviso found in Arkansas, Florida, Indiana and New York to the effect that a correct copy of the will is equivalent to one of the two required witnesses. The purpose of this provision is doubtless to permit the attorney who drew the will and who retained a copy of it to produce the copy and prove that it is a correct copy. But it does not aid the single credible witness who does not possess a copy. If there is no requirement whatever as to the number of witnesses, the attorney with his copy, or the single credible witness who has no copy, may secure probate.

Evidence that the two-witness rule has not worked satisfactorily is found in such cases as *Creek v. Laski*, 248 Mich. 425, 227 N. W. 817

(1929), where a legatee under a lost will was unable to obtain his legacy because of inability to produce two witnesses. He then brought a tort action against the person who destroyed the will, and recovered damages for its malicious destruction. The court avoided the effect of the statute by saying that it applied only to probate proceedings, and thus in effect gave the plaintiff his legacy without forcing him to comply with the statute. In this connection see also *Dulin v. Bailey*, 172 N. C. 608, 90 S. E. 689 (1916) and *Morton v. Pettit*, 124 Ohio St. 241, 177 N. E. 591 (1931).

The Texas statute requires the testimony "of a credible witness who has read it [the will] or heard it read." Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3349. While this may help to prevent fraud, it also prevents establishment of the contents by means of statements of the testator. Since this latter mode of proof is often the best and only method available, it should not be precluded by statute. One's position on this form of enactment is perhaps dependent upon his views on the desirability of permitting partial proof of the contents, for the entire will may be proved more easily by one who has read it or heard it read than by one who has not. If the policy of the legislature points to rejection of partial proof of the contents, the Texas provision may well be an aid to the effectuation of this policy.

Michigan has a unique provision to the effect that no revoking clause or provision which is inconsistent with a prior will produced for probate shall affect the prior will unless the legal execution of the lost will and the revoking clause or inconsistent provisions are "established by at least 2 reputable witnesses, having knowledge thereof." Mich. Stat. Ann. (1943) § 27.3178(96). This provision was perhaps intended to obviate the situation exemplified in such cases as *Estate of Johnston*, 188 Cal. 336, 206 P. 628 (1922), where a revoking clause of a lost will was admitted on the testimony of one witness, in spite of the statute requiring two witnesses for the proof of a lost will, with the result that a prior will which was offered for probate was held to be revoked by the lost will.

Various other statutory requirements should be mentioned. In Texas the cause of non-production of the will must be shown. Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3330, 3349. Since this fact is part of the common-law best evidence rule and is therefore a neces-

sary part of the proof, it is scarcely necessary to spell it out by statute. In Georgia, "the presumption is of revocation by the testator, and that presumption must be rebutted by proof." Ga. Code Ann. (1936) § 113-611. This extends the common-law presumption to cases where the will was not in testator's custody, and may be an aid to the prevention of fraud.

In California provision is made for the establishment of a will destroyed by public calamity in the lifetime of the testator without his knowledge, with the additional provision that knowledge of the destruction by public calamity shall not be imputed to a person committed to an insane hospital. Cal. Prob. Code Ann. (Deering, 1944) § 350. Maine includes "suppressed" along with "lost or destroyed." Me. Rev. Stat. (1944) c. 141, § 9. Moreover, the Maine statute applies not only to lost and destroyed wills, but also to wills which are filed in a foreign jurisdiction and which cannot be produced for that reason. This situation should be provided for in legislation on ancillary administration rather than in the lost wills statute.

Nothing has so far been said about the statutes of Kansas and Minnesota (which are nearly identical) and that of Wisconsin which is similar. These three states have a simple form of enactment: Kansas and Minnesota provide that no lost or destroyed will "shall be established unless it is proved to have remained unrevoked, nor unless its provisions are clearly and distinctly proved," Kan. Gen. Stat. (Supp. 1943) § 59-2228; Minn. Stat. (1941) § 525.261; while in Wisconsin the county court "shall have power to take proof of the execution and validity" of a will "lost or destroyed by accident or design." Wis. Stat. (1943) § 310.10. These statutes have the virtue of avoiding the pitfalls of the existence-at-death formula with its limitation on dependent relative revocation; they also eliminate the requirement of two witnesses. Probably none of them does more than to give the common law the force of legislative approval.

§§ 81, 85. NECESSITY AND EFFECT OF PROBATE

I. NECESSITY OF PROBATE

Provisions are found in many states to the effect that probate is essential. These usually take the form that no will shall be effectual to pass real or personal property until probated. Fla. Stat. Ann.

(1941) § 732.26; Kan. Gen. Stat. (Supp. 1943) § 59-616; Me. Rev. Stat. (1944) c. 155, § 15; Mass. Ann. Laws (1932) c. 191, § 7; Mich. Stat. Ann. (1943) § 27.3178(90); Minn. Stat. (1941) § 525.222; Neb. Rev. Stat. (1943) § 30-220; N. H. Rev. Laws (1942) c. 351, § 1; N. C. Gen. Stat. (1943) § 31-39; Ohio Gen. Code (Page, 1937) § 10504-29; Vt. Pub. Laws (1933) § 2758; Wis. Stat. (1943) § 238.18.

Arkansas, Kentucky and South Carolina provide that no will shall be received in evidence until probated, and in Iowa and North Dakota it is provided that a will shall not be carried into effect until probated. Ark. Dig. Stat. (1937) § 14531; Ky. Rev. Stat. (1944) § 394.130; S. C. Code (1942) § 8964; Iowa Code (1939) § 11882; N. D. Rev. Code (1943) § 30-0505. Both of these forms of statute clearly make probate essential. The Rhode Island statute states that "title to real or personal estate shall pass by will when such will has been finally proved," R. I. Gen. Laws (1938) c. 566, § 41; while in Illinois "every will when admitted to probate . . . is effective to transfer the real and personal property." Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 205. By implication, if not by express language, probate would seem to be essential in both of these states.

In other jurisdictions the courts have held that probate of a will is necessary because of the exclusive jurisdiction of the probate courts over wills. See cases collected in Ann. Cas. 1916 A 887, and 2 Woerner, Administration (3d ed., 1923) § 228. There is no dissent from this proposition as to wills of personal property. The same has been held with respect to wills involving real property. See, for example, *Tompkins v. Tompkins*, 1 Story 547, Fed. Cas. No. 14091 (1841); *Castro v. Richardson*, 18 Cal. 478 (1861); *Johnes v. Jackson*, 67 Conn. 81 at 90, 34 A. 709 (1895). While it is possible to probate a will involving land as well as one involving personalty in all jurisdictions, it would seem that, in a few states, one may prove a will involving land in an action in the nature of trespass or ejectment without first having it admitted to probate. See *Bouton v. Fleharty*, 215 App. Div. 180, 213 N. Y. S. 455 (1926); *Corley v. McElmeel*, 149 N. Y. 228, 43 N. E. 628 (1896); *Weatherhead v. Sewell*, 9 Humph. (28 Tenn.) 272 (1848); *Bagwell v. Elliott*, 2 Rand. (23 Va.) 190 (1824); but see *Taylor v. Taylor*, 2 Humph. (21 Tenn.)

597 (1841) and *Weaver v. Hughes*, 26 Tenn. App. 436 at 443, 173 S.W. (2d) 159 (1943); and see also Tenn. Code (Michie, 1938) § 8127, which, in referring to foreign wills, states that nothing in the sections on probate of foreign wills "is to prevent the proving of such wills as at common law and without probate."

II. EFFECT OF PROBATE

It is common to provide for the effect of probate. In Alabama the judgment upon a contest in equity after probate is conclusive as to all matters which were litigated or which could have been litigated; and in the District of Columbia a contested probate is *res judicata* as to all persons. Ala. Code (1940) t. 61, § 65; D. C. Code (1940) § 19-312. Georgia makes probate in solemn form conclusive on all persons notified and on all legatees. Ga. Code Ann. (1936) § 113-602. In Kentucky probate is conclusive except as to the jurisdiction of the court. Ky. Rev. Stat. (1944) § 394.130. In Washington, probate or rejection of the will is binding and final as to all the world if not contested within six months. Wash. Rev. Stat. (1932) § 1385.

In one group of states (and this is largely composed of the same states which provide that no will shall be effectual to pass real or personal property until probated) probate is made conclusive as to due execution of the will. Iowa Code (1939) § 11882; Me. Rev. Stat. (1944) c. 155, § 15; Mass. Ann. Laws (1932) c. 191, § 7; Mich. Stat. Ann. (1943) § 27.3178(90); Minn. Stat. (1941) § 525.222; Neb. Rev. Stat. (1943) § 30-220; N. H. Rev. Stat. (1942) c. 351, § 1; R. I. Gen. Laws (1938) c. 572, § 7; Vt. Pub. Laws (1933) § 2758; Wis. Stat. (1943) § 238.18. Florida belongs to this group, but provides in addition that probate shall be conclusive that the will is unrevoked. Fla. Stat. Ann. (1941) § 732.26.

Most of the other states have broad provisions to the effect that probate is conclusive; or, in states permitting contest after probate, probate is made conclusive if not contested within the statutory period. States in this latter group usually have a saving clause in favor of persons under disability.

A few states provide that a probated will may be read in evidence without further proof. Ala. Code (1940) t. 61, § 44; Ark. Dig. Stat. (1937) § 14532; Del. Rev. Code (1935) § 3799 (record of

probate is "sufficient evidence"); Ga. Code Ann. (1936) § 113-612; Ind. Stat. (Burns, 1933) § 7-413; Mo. Rev. Stat. Ann. (1942) § 547; N. M. Stat. (1941) § 32-218; Tenn. Code (Michie, 1938) § 8139 (probate is "sufficient evidence" of a devise of realty). Most of these states have other statutes on the necessity and effect of probate, but Delaware, Indiana and Tennessee apparently have no other statutory provisions on the subject.

§ 83. TIME LIMIT FOR PROBATE

Statutes have been found in twelve states setting up an absolute time limit on the probate of wills or grant of administration or both. The period varies from one to twenty-one years. In some states exceptions are written into the statute, or the court is given discretion to waive the limitation, but in other states no exceptions are made. The salient points of the various statutes are indicated in the excerpts which follow:

Ala. Code (1940) t. 61, § 34. "Wills shall not be effective unless filed for probate within five years from the date of the death of the testator."

Conn. Gen. Stat. (1930) § 4909. "Administration of the estate of any person shall not be granted, nor shall the will of any person be admitted to probate, after ten years from his decease, unless the court of probate upon written petition and after public notice and hearing shall find that administration of said estate ought to be granted, or that said will should be admitted to probate; but when any minor is interested, one year shall be allowed after his arrival at full age to take out administration or to cause said will to be proved. In all cases where any person has died leaving estate which is not known to those interested in the same within the time above limited, but is discovered afterwards, administration may be granted within one year after its discovery."

Iowa Code (1939) § 11891. "Administration shall not be originally granted after five years from the death of the decedent, or from the time his death was known, in case he died out of the state."

§ 11892. "When personal property belonging to the estate of decedent is discovered after the expiration of said five years, administra-

tion may be granted after the five-year limit, for the purpose only of making proper disposition and distribution thereof."

Kan. Gen. Stat. (Supp. 1943) § 59-617. "No will of a testator who died while a resident of this state shall be effectual to pass property unless an application is made for the probate of such will within one year after the death of the testator, except as hereinafter provided."

§ 59-618. When the will is withheld for over a year from the death of the testator, it "may be admitted to probate as to any innocent beneficiary . . . if such application is made within ninety days after he has knowledge of such will and access thereto and within five years after the death of the testator. . . ." Bona fide purchasers are protected after one year from the death of the decedent.

Ky. Rev. Stat. (1944) § 395.010. "Original administration shall not be granted after the expiration of twenty years from the death of the testator or intestate, and if made after that time it shall be void."

Me. Rev. Stat. (1944) c. 141, § 1. " . . . After 20 years from the death of any person, no probate of his last will or administration on his estate shall be originally granted except as provided in the following section, unless it appears that there are moneys due to said estate from this state or the United States. . . ."

§ 2. "When administration has not been taken on the estate of an intestate within 20 years after the death of such intestate, and thereafter any property of at least \$20 in value accrues to said estate, or belonging thereto, first comes to the knowledge of any person interested in said estate, original administration may be granted on such property, at any time within 2 years next after it so accrued or first became known, but such administration shall affect no other property and shall not revive debts due to or by said intestate."

Mass. Ann. Laws (1932) c. 193, § 4. "Administration shall not be originally granted after the expiration of twenty years from the death of the testator or intestate, except in cases expressly authorized by law."

C. 193, § 5. "If administration has not been taken on the estate of a testator or intestate within twenty years after his decease, and any property or claim or right thereto remains undistributed or thereafter accrues to such estate and remains to be administered, original ad-

ministration may for cause be granted, but it shall affect no other property. . . ."

N. D. Rev. Code (1943) § 30-0506. "A proceeding for the probate of a will may be commenced:

"1. If a written will, within six years after the testator's death, or if the will is not made known within that time, then within one year after its discovery. . . ."

Ohio Gen. Code (Page, 1937) § 10509-13. "Administration shall not be originally granted as of right after the expiration of twenty years from the death of the testator or intestate. But, within his county, each probate judge may grant letters of original administration upon the estate of a person deceased, after the expiration of twenty years, upon petition of the next of kin or other person or persons interested, or their agent, and on good cause shown therefor. . . ."

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 342. "No letters testamentary or of administration shall in any case be originally granted upon the estate of any decedent after the expiration of twenty-one years from the day of his decease, except on the order of the orphans' court upon due cause shown."

Tenn. Code (Michie, 1938) § 8167. "The time within which administration may be granted shall be as follows:

"1. Where a person dies entitled to a vested or contingent remainder, not reduced to possession in his lifetime, ten years after the termination of the life or other particular estate on which the remainder depends, letters shall be given to administer upon his estate in said remainder.

"2. Administration may be granted at any time within twenty-two years from the death of the deceased to any person entitled to distribution who was an infant when the deceased died.

"3. A special administration may be granted for the purpose of prosecuting any claim against the government of the United States, without any limitation of time.

"4. In no other cases shall letters of administration be granted where the deceased died ten years before application made for the same; and all such letters testamentary or of administration, granted after the said period, shall be utterly void and of no effect."

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Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3325. "All applications for the grant of letters testamentary or of administration upon an estate must be filed within four years after the death of the testator or intestate; provided that this Article shall not apply in any case where administration is necessary in order to receive or recover funds or other property due the estate of the decedent."

Art. 3326. "No will shall be admitted to probate after the lapse of four years from the death of the testator unless it be shown by proof that the party applying for such probate was not in default in failing to present the same for probate within the four years aforesaid; and in no case shall letters testamentary be issued where a will is admitted to probate after the lapse of four years from the death of the testator."

In addition to these statutes, there are provisions in several states to the effect that claims of creditors are barred if no administration is had within a certain time after the death of the decedent. These statutes are collected in the appendix note for § 135, *infra*. As to time limitations on probate of a will discovered after probate of an earlier one, see appendix note for § 73.

§ 106. AMOUNT OF BOND

The statutes on the amount of the personal representative's bond fall into three general categories: (1) those leaving the amount to the discretion of the court; (2) those enunciating the traditional rule that the bond must be in a sum equal to double the value of the estate (usually including the personal estate and the annual income from real estate); and (3) those stipulating a fixed ratio less than the traditional one. Within each group, of course, there are variations. Thus, a guide for the court is sometimes laid down in those states which leave the amount to the discretion of the court. In some states which lay down a fixed ratio, the value of the real estate and its income are not taken into consideration, and in a few which do include the income from realty, the period from which the amount of the bond is computed is longer than a year. It is common to provide for a reduced amount of the bond if the surety is a corporation; and in some states a reduction is provided for in case the personal representative is the residuary legatee, or if all interested persons consent to a reduced amount. In addition to these rules, many statutes take cognizance of

testamentary directions as to reduction or total dispensation of the bond; this note, however, does not purport to cover such statutes. Nor does it cover bonds for the sale of real property, whether given at the beginning of administration or at the time the sale is made. Also excluded are rules for deposit of assets of the estate with consequent reduction in the amount of the bond.

While in most cases it is not difficult to determine into which of the three general categories the various statutes fall, there is ambiguity in some statutes. Therefore no attempt is made here to group the various statutes. Rather, they will be listed alphabetically by states, with brief explanatory notes for each one.

Ala. Code (1940) t. 61, § 96. Not less than double the value of the personal property, and double the value of the rents of real estate for a term of three years; or, at the discretion of the judge, not less than double the value of the real and personal property.

Ariz. Code (Supp. 1945) § 38-502. Not less than the value of the personal property and annual rents of real property. The court may dispense with bond in estates of less than \$2000 when the whole estate goes to the surviving spouse and such spouse is applying for letters in person.

Ark. Dig. Stat. (Supp. 1944) § 22. Not less than double the amount of the estimated value of the estate; but if executed by a surety company, then not more than the value of the estate.

Cal. Prob. Code Ann. (Deering, 1944) § 541. Not less than twice the value of the personal property and twice the value of the income of realty; but if executed by a surety company, the court in its discretion may fix the amount at not less than the value of the personalty and annual rents of all property.

Colo. Stat. (Supp. 1944) c. 176, § 95. At least equal to and not more than double the amount of the personal estate and rents of real estate.

Conn. Gen. Stat. (1930) § 4787. An amount satisfactory to the court of probate. Cf. § 4887, stating a special rule for the case where the testator dispenses with bond or stipulates its amount.

Del. Rev. Code (1935) § 3813 (amended by Laws 1939, c. 139). Not less than the best estimate that can be made of the personal estate.

D. C. Code (1940) § 20-104. Except as provided in §§ 20-203, 20-302 and 20-303, an amount sufficient to secure the proper application of all the personal estate. (Sections 20-203 and 20-303 provide for the case where the executor or administrator is entitled to the residue of the estate; § 20-302 provides for the case where the testator dispenses with bond.) Cf. § 20-202 and 20-301, providing for a bond in such penalty as the court may require.

Fla. Stat. Ann. (1941) § 732.61. As the judge deems sufficient, respect being had to the value of the estate.

Ga. Code Ann. (1936) § 113-1217. Administrator's bond is equal to double the amount of the estate to be administered. Cf. § 113-1216, stating that no bond is required of an executor unless the court orders one.

Idaho Laws Ann. (1943) § 15-333. Not less than twice the value of the personal property and twice the value of the annual rents of real property; but if executed by a surety company, then not less than the value of the personal property and the value of the annual rents of real property.

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 303. Not less than double the value of the personal estate; but if executed by a surety company, then not less than one and one-half times the value of the personal estate; in no case less than \$500.

Ind. Stat. (Burns, Supp. 1943) § 6-501. Not less than double the value of the personal estate.

Iowa Code (1939) § 11887. As required by the court.

Kan. Gen. Stat. (Supp. 1943) § 59-1101. Not less than 125% of the value of the personal property and the annual income from real property.

Ky. Rev. Stat. (1944) § 395.130. Bond of administrator, administrator c.t.a. and curator must be sufficient to secure the value of the whole estate. No rule given for executors, except that the will may dispense with bond.

Me. Rev. Stat. (1944) c. 141, §§ 11, 22. As the judge orders. Under c. 141, § 20, the court may grant letters of administration or administration c.t.a. to the spouse or next of kin without bond if all interested persons other than creditors assent. Under c. 151, § 5, if executed by a surety company, the penal sum may be reduced.

Md. Code (1939) art. 93, §§ 40, 44. As prescribed by the court or register; if executed by a surety company, then not exceeding the value of the property and assets of the estate. Note special rule in § 44 for the case where the testator dispenses with bond.

Mass. Ann. Laws (1932) c. 205, § 1. As the court may order. See also c. 205, § 3, providing a special rule when the executor is residuary legatee.

Mich. Stat. Ann. (1943) § 27.3178(253). As the judge may direct.

Minn. Stat. (1941) § 525.32. In such amount as the court directs.

Miss. Code (1942) § 514. Executor's bond must be equal to the full value of the estate; § 515, special rule when he is residuary legatee; § 527, administrator's bond must be equal to the value of all the personal estate.

Mo. Rev. Stat. Ann. (1942) §§ 18, 20. Not less than double the amount of the personal estate.

Mont. Rev. Code (Supp. 1939) § 10088. Not less than the value of the personal property and the annual rents of real property, nor more than twice the value of such personalty and rents of realty; the court may in its discretion fix a smaller sum if all persons entitled to the estate assent. Under § 10096, the court may dispense with bond if there are no assets warranting the necessity of a bond, or if the testator so requests.

Neb. Rev. Stat. (1943) § 30-1501. As the judge shall direct.

Nev. Comp. Laws (Supp. 1941) § 9882.68. Not less than the value of the personal property, including rents and profits.

N. H. Rev. Stat. (1942) c. 352, § 13. As the judge shall direct.

N. J. Rev. Stat. (1937) § 3:8-1. As the court shall direct, having due regard to the value of the estate and the extent of the representative's authority.

N. M. Stat. (1941) § 33-116. At least double the value of the personal estate; but if executed by a surety company, then 10% in excess of the value of the personal estate.

N. Y. Surr. Ct. Act, §§ 121, 135. Not less than the value of the personal property and the rents of real property for eighteen months, and of the probable amount to be recovered by reason of any right of

action; the court may reduce or dispense with bond if all interested persons agree.

N. C. Gen. Stat. (1943) § 28-34. At least double the value of all the personal property; but if executed by a surety company, then one and one-fourth times the value of all the personal property.

N. D. Rev. Code (1943) § 30-1107. Not less than twice the aggregate value of the personal property and the rents of real property for one year; but if executed by a surety company, then 10% in excess of the value of the personal property and annual rents of real property.

Ohio Gen. Code (Page, 1937) § 10506-4. Not less than double the value of the personal estate and of the annual rents of real estate. Section 10506-18 (Supp. 1944) provides a special rule when personal representative is sole residuary distributee or legatee.

Okla. Stat. (1941) t. 58, § 171. Not less than twice the value of the personal property and twice the value of annual rents of realty.

Ore. Comp. Laws (1940) § 19-218. Not less than double the value of the personal property and double the value of the annual rents of real property; but if executed by a surety company, then not less than the value of the personal property and annual rents of real property.

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 403. Amount fixed by registrar, respect being had to the value of the estate.

R. I. Gen. Laws (1938) c. 576, § 1. As the court shall require.

S. C. Code (1942) §§ 8958, 8975. Double the value of the personal property; but if executed by a surety company, then one and one-half times the value of the personal property.

S. D. Code (1939) § 35.0903. Not less than one and one-half times the value of the personal property and one and one-half times the value of the annual rents of real property; if the value of the personalty and annual rents of realty exceeds \$2000, the penalty of the bond shall be equal to the value of these items and such additional amount as the court directs.

Tenn. Code (Michie, 1938) § 8169. Double the value of the estate; but it may be as low as the value of the estate if it is proved that the estate and all interested persons would be fully protected by such smaller bond.

Tex. Civ. Stat. Ann. (Vernon, Supp. 1945) art. 3386. Equal to double the estimated value of the personal property, plus a reasonable amount to be fixed at the discretion of the judge to cover rents of real estate; but if executed by a surety company, then equal to the value of the personalty plus a reasonable amount to be fixed at the discretion of the judge to cover rents of realty.

Utah Code (1943) § 102-5-2. Not less than twice the value of the personal property and twice the value of the annual rents of real property; but if executed by a surety company, then not less than 10% in excess of the value of the personal property and the value of the annual rents of real property.

Vt. Pub. Laws (1933) § 2778. As the court directs.

Va. Code (1942) § 5370. At least equal to the full value of the personal estate.

Wash. Rev. Stat. (Supp. 1940) § 1437. To be fixed by the court; if petition for letters is made by or on request of the surviving spouse, and the court is satisfied that the value of the estate does not exceed the exemptions allowed to the spouse, the court may in its discretion dispense with bond; if the value of the estate does not exceed \$500 and rights of heirs and creditors will not be jeopardized, the court may dispense with bond.

W. Va. Code (1943) § 4126. At least equal to the full value of the personal estate.

Wis. Stat. (1943) §§ 310.14, 311.05. As the judge may direct; if it appears that no property will come into the hands of the administrator except proceeds of claims for the decedent's death or injuries, then no bond shall be required until proceeds are to be paid over to him.

Wyo. Rev. Stat. (1931) § 88-2202. Not less than the value of the personal property and the value of the annual rents of real property.

§ 107. BOND OF CORPORATE FIDUCIARY

Provisions were found in seventeen states either requiring or permitting trust companies to deposit securities with the state treasurer or other state official. Except as noted in the following list, these states dispense with the requirement of giving an executor's or administrator's bond, the deposit being deemed sufficient security. Ala. Code

(1940) t. 5, §§ 191 and 195 (bond is required if the company's aggregate liabilities exceed five times the par value of the deposited securities); Cal. Gen. Laws (Deering, 1944) Act 1749, § 7; Cal. Prob. Code Ann. (Deering, 1944) § 481; Cal. Code Civ. Proc. (Deering, 1941) § 1044; Fla. Stat. Ann. (1941) §§ 655.10 and 732.61; Ill. Ann. Stat. (Smith-Hurd, Supp. 1944) c. 32, §§ 289 and 292; Mich. Stat. Ann. (1943) §§ 23.1011 and 27.3178(258) (court has discretion to require bond); Minn. Stat. (1941) §§ 48.67 and 48.79; Mo. Rev. Stat. Ann. (1942) § 8068; N. J. Rev. Stat. (1937) § 17:4-41; N. M. Stat. (1941) § 50-505; N. Y. Banking Law, §§ 95 and 100-a, subd. 5 (court has discretion to require a bond); N. D. Rev. Code (1943) §§ 6-0504, 6-0511; Ohio Gen. Code (Page, 1937) §§ 710-150 and 710-161 (court has discretion to require a bond); Okla. Stat. (1941) t. 6, § 331; Ore. Comp. Laws (1940) §§ 40-1202 and 40-1219; R. I. Gen. Laws (1938) c. 133, § 4, subd. f, and § 6 (bond is required, but no surety is necessary unless the court requires it); S. D. Code (1939) §§ 6.0501, subd. 4, and 6.0502 (court has discretion to require bond); Wis. Stat. (1943) §§ 223.02 and 223.03, subd. 8 (court has discretion to require bond).

In addition to these states, there are nineteen others which dispense with bond in case of a corporate fiduciary, or dispense with the requirement of giving surety on the bond, although there is no provision for deposit of securities with the state. This group consists of the following: Ark. Dig. Stat. (1937) § 248 (requires bond only to extent that estate exceeds \$5000); Colo. Stat. (Supp. 1944) c. 176, § 95 (but court may require security); Conn. Gen. Stat. (Supp. 1939) § 1203e (but court may require bond); Del. Rev. Code (1935) §§ 3416, 4398; D. C. Code (1940) §§ 26-333, 26-334 (but court may require bond); Ind. Stat. (Burns, 1933) § 18-1110 (but court may require bond); Kan. Gen. Stat. (1935) § 17-2002, subd. 5 (but court may require bond); Ky. Rev. Stat. (1944) § 287.220 (but court may require security); Me. Rev. Stat. (1944) c. 55, § 86, subd. 9 (but court may require security); Mass. Ann. Laws (1932) c. 172, §§ 55, 58; c. 205, § 6A (but court may require security); N. M. Stat. (1941) § 33-105 (as to national banks); N. C. Gen. Stat. (1943) § 58-113 (this section seems to apply only to insurance com-

panies); Pa. Stat. Ann. (Purdon, 1939) t. 7, § 819-1106; Tex. Civ. Stat. Ann. (Vernon, 1940) art. 4982; Utah Code (1943) § 7-4-5 (but court may require bond); Vt. Pub. Laws (1933) § 6812 (amended Laws 1943, #133, § 23) (requires bond not less than 25% of the amount of the estate; no bond required in estates under \$2000); Va. Code (1942) § 4149(69), subd. j (but bond is required when value of estate exceeds capital and surplus); W. Va. Code (1943) § 3134 (but court may require security when value of estate exceeds capital and surplus); Wyo. Rev. Stat. (1931) § 10-403, subd. 10 (but court may require bond).

There seem to be only five states which explicitly require a corporate fiduciary to give bond. They are as follows: Ga. Code Ann. (1936) § 109-409 (national banks required to give bond); Iowa Code (1939) § 9291; Miss. Code (1942) § 5198; N. H. Rev. Laws (1942) c. 312, § 14; S. C. Code (1942) § 7838.

In the other states there seems to be no provision made for bonds of corporate fiduciaries; hence the provisions for bonds of personal representatives probably apply to corporations, with the result that they must give bond to the same extent that individuals are required to do.

§ 119. LIMITATION OF ACTION ON BOND

About half the states provide a special limitation period for actions on a representative's bond, and the period varies from one year in Florida to twenty years in Georgia and New Jersey. The following list indicates the limitation period for the various jurisdictions having a special statute:

Ala. Code (1940) t. 7, § 21. Six years from the act done.

Ariz. Code (1939) § 29-205. Four years after death, resignation, removal or discharge of representative.

Ark. Dig. Stat. (1937) § 8936. Eight years after cause of action accrues.

Conn. Gen. Stat. (1930) § 6008. Six years from final settlement of account of the principal and the acceptance of such account by the probate court; does not apply to minor parties in interest.

Del. Rev. Code (1935) § 5124. Six years from date of the bond; the bond of an executor who during his life shall be entitled under the

will to the personal estate shall continue in force for three years after the executor's death.

D. C. Code (1940) § 12-201. Five years after cause of action accrues.

Fla. Stat. Ann. (1941) § 734.23. One year from discharge of the representative.

Ga. Code Ann. (1936) § 3-703. Twenty years after cause of action accrues.

Ill. Ann. Stat. (Smith-Hurd, 1935) c. 83, § 17. Ten years after cause of action accrues.

Kan. Gen. Stat. (1935) § 60-306, subd. 5. Five years after cause of action accrues.

Ky. Rev. Stat. (1944) § 413.090, subd. 3. Fifteen years after cause of action accrues.

Me. Rev. Stat. (1944) c. 151, § 9. Six years after representative has been cited to appear to settle his account; if not so cited, six years from the time of breach of the bond; if the breach is fraudulently concealed, three years from the time the breach is discovered.

Md. Code (1939) art. 57, § 3. Twelve years after principal debtor and creditor are dead, or the debt or thing in action is above twelve years' standing; infants and insane persons have six years after removal of disability.

Mich. Stat. Ann. (Supp. 1943) § 27.605, subd. 4. Four years after discharge of the representative.

Mo. Rev. Stat. Ann. (1942) § 56. Seven years after revocation or surrender of letters, or death of the principal.

Neb. Rev. Stat. (1943) § 25-209. Ten years (probably means ten years after cause of action accrues).

N. J. Rev. Stat. (1937) § 2:24-18. Twenty years from date of bond; period of infancy or insanity of persons entitled to the benefit of the bond is not computed as part of the twenty years.

N. M. Stat. (1941) § 27-107. Two years after the liability of the principal shall have been fully established or determined by a judgment of the court.

N. C. Gen. Stat. (1943) § 1-52, subd. 6. Three years after breach complained of.

Ohio Gen. Code (Page, 1937) § 11226. Ten years after cause of action accrues.

Okla. Stat. (1941) t. 12, § 95, subd. 5. Five years after cause of action accrues.

Tenn. Code (Michie, 1938) § 8600. Six years after cause of action accrues.

Tex. Civ. Stat. Ann. (Vernon, 1941) art. 5528. Four years after death, resignation, removal or discharge of the representative.

Va. Code (1942) §§ 5810, 5811. Ten years after cause of action accrues.

Wash. Rev. Stat. (1932) § 1450. Six years after revocation of letters of administration or death of the principal.

W. Va. Code (1943) §§ 5398, 5399. Ten years after cause of action accrues.

Wis. Stat. (1943) § 321.02. Four years from discharge of representative; four years after removal of disability of person entitled to bring action.

Wyo. Rev. Stat. (1931) § 89-413. Ten years after cause of action accrues.

Several states provide a limitation for actions on guardians' bonds, but apparently make no provision for bonds of executors and administrators.

In those states which have no special statute for actions on bonds, resort must be had to the general statute of limitations for actions on instruments in writing. There is wide variation here. Cal. Code Civ. Proc. (Deering, 1941) § 337 provides a four-year limitation, while Ind. Stat. (Burns, 1933) § 2-602 gives ten years. In some states the period is longer in the case of instruments under seal than for those not under seal, e.g., Mass. Ann. Laws (1932) c. 260, §§ 1, 2.

The limitation set out in the Model Probate Code is shorter than that in any of the states except Florida. But precedent is found in the Bankruptcy Act, which limits actions on a referee's bond to two years after the alleged breach of the bond, and actions on receivers' and trustees' bonds to two years after their discharge. Fed. Code Ann. (1940) t. 11, § 78 (l) and (m). Moreover, it is believed that the general trend is toward a shortening of limitation periods.

§ 120. WHAT INVENTORY INCLUDES

The statutes of all the states require the personal property, including the debts due the estate, to be included in the inventory that the administrator or executor must file with the court. A few of the states, for example Me. Rev. Stat. (1944) c. 141, § 62, provide for the omission of clothes of the deceased and items of personal adornment up to a certain amount. For a unique provision relating to debts owed by the estate see Del. Rev. Code (1935) § 3830.

The following statutes provide that real property be included in the inventory: Ariz. Code (1939) § 38-803; Cal. Prob. Code Ann. (Deering, 1944) § 600; Colo. Stat. (1935) c. 176, § 145; Conn. Gen. Stat. (1930) § 4911 (except realty outside Connecticut); D. C. Code (1940) § 18-401 (included if court so orders); Fla. Stat. Ann. (1941) §§ 733.01, 733.03; Ga. Code Ann. (1936) §§ 113-1401, 113-1402 (includes realty in county where administration is had); Idaho Laws Ann. (1943) §§ 15-401, 15-403; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 323, 324; Ind. Stat. (Burns, 1933) § 6-705 (realty included if devised to executor or directed in will to be sold); Iowa Code (1939) § 11913; Kan. Gen. Stat. (Supp. 1943) § 59-1201; Me. Rev. Stat. (1944) c. 141, § 57; Md. Code (Supp. 1943) art. 93, §§ 213, 214A (included if letters are granted in Montgomery County); Mass. Ann. Laws (1932) c. 195, § 5; Mich. Stat. Ann. (1943) § 27.3178(382); Minn. Stat. (1941) § 525.33; Mo. Rev. Stat. Ann. (1942) § 58; Mont. Rev. Code (1935) §§ 10129, 10131; Neb. Rev. Stat. (1943) § 30-401; Nev. Comp. Laws (Supp. 1941) § 9882.100; N. H. Rev. Laws (1942) c. 353, § 1; N. M. Stat. (1941) § 33-302; N. C. Gen. Stat. (1943) § 28-50; N. D. Rev. Code (1943) § 30-1501; Ohio Gen. Code (Page, 1937) § 10509-41; Okla. Stat. (1941) t. 58, § 283; Ore. Comp. Laws (1940) § 19-401; S. D. Code (1939) § 35.1203; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3408; Utah Code (1943) § 102-7-3; Vt. Pub. Laws (1933) § 2805; Va. Code (1942) § 5403; Wash. Rev. Stat. (1932) § 1466; W. Va. Code (1943) § 4182; Wis. Stat. (1943) § 312.01; Wyo. Rev. Stat. (1931) § 88-2303.

In the following jurisdictions realty is not included in the inventory: Ala. Code (1940) t. 61, § 191; Ark. Dig. Stat. (1937) § 51; Del.

Rev. Code (1935) § 3830 (amended Laws 1937, c. 191); D. C. Code (1935) § 18-401 (not included unless court so orders); Ind. Stat. (Burns, 1933) §§ 6-701, 6-705 (not included unless realty is devised to executors or directed in will to be sold); Md. Code (Supp. 1943) art. 93, §§ 213, 214A (not included unless letters are granted in Montgomery County); Miss. Code (1942) § 548; N. J. Rev. Stat. (1937) § 3:9-5; N. Y. Surr. Ct. Act, §§ 195, 197; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 442; R. I. Gen. Laws (1938) c. 577, § 1; S. C. Code (1942) § 8987; Tenn. Code (Michie, 1938) § 8189. Kentucky probably belongs in this group also. See Ky. Rev. Stat. (1944) § 395.180.

§ 130. DISCLOSURE PROCEEDINGS

Statutes setting up disclosure proceedings have been found in about three-fourths of the states. In the majority of these states the procedure is for discovery only—that is, its sole object is the gathering of information, and not the recovery of damages or possession. Statutes of this type are listed below:

Ariz. Code (1939) § 38-812; Cal. Prob. Code Ann (Deering, 1944) § 613; Colo. Stat. (1935) c. 176, § 242; Conn. Gen. Stat. (1930) § 4959; Idaho Laws Ann. (1943) § 15-413; Ind. Stat. (Burns, 1933) § 6-911; Kan. Gen. Stat. (Supp. 1943) § 59-2216; Me. Rev. Stat. (1944) c. 141, § 83; Mass. Ann. Laws (Supp. 1944) c. 215, § 44; Mich. Stat. Ann. (1943) § 27.3178(385); Minn. Stat. (1941) § 525.85; Mont. Rev. Code (1935) § 10141; Neb. Rev. Stat. (1943) § 30-407; N. H. Rev. Laws (1942) c. 354, § 1; N. D. Rev. Code (1943) § 30-1307; Okla. Stat. (1941) t. 58, § 293; Ore. Comp. Laws (1940) § 19-303; R. I. Gen. Laws (1938) c. 569, § 10; S. D. Code (1939) § 35.1108; Vt. Pub. Laws (1933) § 2878; Wash. Rev. Stat. (1932) § 1472; Wyo. Rev. Stat. (1931) § 88-2402.

In some states, however, the statute purports to provide for final disposition of the property itself. In three states it is provided that a jury may be had to try questions of title, and in two others the case law so indicates. In other states the statute does not provide for jury trial, but provides that the court may order delivery of the property to the executor or administrator. In most of these states, however,

this power is limited by statute or decision to cases in which title is not in question. There are a few states in which no cases have been found, but the courts in these states will doubtless follow the same course of reasoning.

Pertinent provisions of the statutes which purport to provide for final disposition of the property, together with any relevant cases, are as follows:

Ark. Dig. Stat. (1937) § 57. "If any such person shall be convicted of unlawfully detaining any such goods, chattels, moneys, effects, books, papers, or evidences of debt, the court may compel the delivery thereof to the executor or administrator entitled to receive the same by attachment."

D. C. Code (1940) § 20-503. ". . . If satisfied, upon an examination of the whole case, that the party charged has concealed any part of the estate of the deceased, the court may order the delivery thereof to the executor, administrator or collector, and may enforce obedience to such order in the same manner in which orders of said court may be enforced."

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 337. "The court . . . may determine all questions of title, claims of adverse title, and the right of property, and may enter such orders and judgment as the case requires. . . ."

C. 3, § 338. "Upon the demand of any party to the proceeding questions of title, claims of adverse title, and the right of property shall be determined by a jury."

Iowa Code (1939) § 11925. ". . . If on such examination it appears that he has the wrongful possession of any such property, the court or judge may order the delivery thereof to the executor or administrator."

In re Estate of Brown, 212 Iowa 1295, 235 N. W. 754 (1931). *Held*, a proceeding under this section is inquisitorial, and cannot be used where the defendant claims title, for it would deprive him of due process by virtue of lack of jury trial.

Md. Code (1939) art. 93, § 252. ". . . If satisfied upon an examination of the whole case that the party charged has concealed any part of the personal estate of the deceased, may order the delivery

thereof to the administrator, and may enforce obedience to such order by attachment, imprisonment or sequestration of property."

Art. 93, § 254. "If . . . either party shall require it, the court shall cause an issue or issues to be made up and sent to the circuit court for the county, or the superior court of Baltimore City, the court of common pleas, or the Baltimore City court, as the case may be, to be there tried and disposed of as other issues from the orphans' court. . . ."

Hopper v. Hopkins, 162 Md. 448, 160 A. 166 (1932) holds that concealment—i. e., secrecy—is essential for a proceeding under § 252, and that the court has no jurisdiction where there is no concealment or where the defendant sets up title in himself.

Forsythe v. Baker, 180 Md. 144, 23 A. (2d) 36 (1941) indicates that a jury is used when issues are sent over for trial.

Miss. Code (1942) § 545. ". . . If on the hearing it shall appear that any person has property or assets of the estate to which there is no adverse claim the court or chancellor may direct it to be delivered to the executor or administrator who shall forthwith account therefor in his inventory. But no decree shall be rendered in such proceeding concerning any adverse claim set up by any person to any of the assets. . . ."

Mo. Rev. Stat. Ann. (1942) § 66. "The issue upon the interrogatories and answers thereto shall be tried by a jury, or if neither of the parties require a jury, by the court, in a summary manner, and judgment shall be rendered according to the finding and for costs, and if convicted, the court shall compel the delivery of the property detained by attachment of his person for contempt, and the court shall commit him to jail until he comply with the order of the court."

Nev. Comp. Laws (Supp. 1941) § 9882.109. ". . . The district court may make an order requiring such person to deliver any such property or effects to the executor or administrator. . . . The order of the court for the delivery of such property shall be prima facie evidence of the right of the executor or administrator to such property in any action that may be brought for the recovery thereof. . . ."

N. J. Rev. Stat. (1937) § 3:13-9. ". . . The court may, by order or decree, take such proceedings for the recovery of assets of the estate so discovered as may be taken in like cases in the court of

chancery, and may compel obedience to such order or decree by the same process and in the same manner as orders or decrees of the court of chancery may be enforced."

N. Y. Surr. Ct. Act, § 206. ". . . If it appears that the petitioner is entitled to the possession of the property, the decree shall direct delivery thereof to him, or if the estate property shall have been diverted or disposed of the decree may direct payment of the proceeds or value of such property or may impress a trust upon said proceeds or make any determination which a court of equity might decree in following trust property or funds. If such answer alleges title to or the right to possession of any property involved in the inquiry, the issue raised by such answer shall be heard and determined and a decree made accordingly."

§ 68. "In any proceeding in which any controverted question of fact arises, of which any party has constitutional right of trial by jury . . . the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding demands the same"

Matter of Wilson, 252 N. Y. 155, 169 N. E. 122 (1929). *Held*, there is no deprivation of a constitutional right to jury in a proceeding for disclosure, as § 68 of the Surrogate Court Act gives the right to a jury trial in such a proceeding. The court can determine the rights of third persons in such a proceeding.

N. C. Gen. Stat. (1943) § 28-69. If the defendant admits possession of "any property belonging solely to decedent and fails to show any satisfactory reason for retaining possession of said property, the clerk of the superior court shall issue an order requiring said person, firm or corporation forthwith to deliver said property to said executor or administrator, and may enforce compliance with said order by an attachment for contempt of court, and commit said person to jail until he shall deliver said property to said executor or administrator."

Ohio Gen. Code (Page, 1937) § 10506-73. "By the verdict of a jury, if either party requires it, or without, if not required, the court shall determine whether the person or persons accused is or are guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, goods, chattels, things in action or effects of the trust

estate, and if found guilty, the court shall assess the amount of damages to be recovered on account thereof; or the court, in its discretion, may order the return of the specific thing or things concealed or embezzled, or may order restoration in kind. The court shall have authority to cite into court all persons who claim any interest in the assets alleged to have been concealed, embezzled, conveyed or held in possession, and at such hearing shall have authority to hear and determine questions of title relating to such assets. . . ."

Utah Code (1943) § 102-11-18. ". . . If on such examination it appears that he has wrongful possession of any such property, not adversely claimed, the court may order the delivery of the same to the executor or administrator of the estate."

Wis. Stat. (1943) § 312.06, subd. 2. The court "may make such order in relation to said matter as shall be just and proper."

Estate of Schaefer, 189 Wis. 395, 207 N. W. 690 (1926). *Held*, the court cannot determine title or order delivery of the property in question, for this would be a deprivation of the right to jury trial.

As to jurisdiction of the probate court to determine title which the personal representative claims in his own right, see annotation in 90 A. L. R. 134. Generally on disclosure proceedings in decedents' estates, see Atkinson, Wills (1937) 596, 608; 2 Woerner, Administration (3d ed., 1923) § 325.

§ 135. NONCLAIM STATUTES

Nonclaim statutes exist in every state, although in a few states the legislation on the subject is meager. The statutes are of three general types, each of which will be discussed separately. The first type, which is the most common, bars creditors entirely unless their claims are filed within the statutory period, while the second type merely postpones payment in favor of those claims which were filed on time. The third type protects the personal representative who pays out the assets of the estate as against claimants who failed to file their claims within the nonclaim period. In addition to these three types of statute there is another sort of nonclaim statute, which creates a bar against claims in cases where no administration is had within a certain period after the death of the decedent. This group of statutes will be discussed last.

I. ESTATES WHICH ARE ADMINISTERED

1. *Statutes creating an absolute bar.* Thirty-five states have statutes of this type, of which twenty-seven provide an inflexible period for filing claims, three provide a variable period depending on the size of the estate, and five permit the court to set the time within specified statutory limits. In most states the period begins to run from the first publication of notice to creditors, while in some states it begins to run from the time of the grant of letters testamentary or of administration. The period allowed varies widely from state to state. Thus in Michigan and Utah the court may set a time as short as two months after the first publication of notice to creditors, while in Nebraska eighteen months may be allowed in the first instance, with a possible extension for another nine months. Between these outside limits, almost every conceivable period may be found, six months and twelve months being common.

A number of the states in this group provide for extensions of the period under certain conditions. Thus in eight states a creditor who can show that he had no notice by reason of being out of the state may be permitted to file his claim at any time prior to the decree of final distribution. Other states permit an extension for cause shown, or for circumstances entitling the claimant to equitable relief. Alabama is unique in its extension for claimants under disabilities, and Kansas stands alone in permitting the provisions of the will as to delayed payment to control. Some states provide an extension when proof of notice to creditors is not made, but these statutes are not listed here.

It must be remembered that in some states the nonclaim statute does not bar all types of claims. No effort is made to indicate here the types of claims which are barred in the various states, but a few examples may be mentioned. Thus the Arizona statute applies to "all claims arising on contracts, whether due, not due or contingent," but does not refer to tort claims. Ariz. Code (1939) § 38-1003. Many states expressly save obligations secured by mortgage to the extent of the lien. S. D. Code (1939) § 35.1404. In Maine there are special provisions for the filing of claims which accrue after the nonclaim period has expired. Me. Rev. Stat. (1944) c. 152, §§ 18, 20. Statutes in many other states, however, are similar to the Model

Probate Code in barring all claims of whatever nature. See Ala. Code (1940) t. 61, § 211; Colo. Stat. (Supp. 1944) c. 176, § 207; Del. Rev. Code (1935) § 3861 (amended Laws 1939, c. 142) (as to personal estate); Fla. Stat. Ann. (1941) § 733.16; Iowa Code (1939) § 11972 (amended Laws 1941, c. 301); Kan. Gen. Stat. (Supp. 1943) § 59-2239; N. M. Stat. (1941) § 33-803; Wash. Rev. Stat. (1932) § 1484; Wis. Stat. (1943) §§ 313.08, 313.22. In some states provision is made for reaching assets in the hands of distributees, but no attempt will be made here to list these statutes or to analyze their effect. In general, however, it may be said that they apply only to contingent claims. See Simes, Comment, 41 Mich. L. Rev. 920 (1943).

The time limits provided in the thirty-five states in this group are as follows:

(a) Invariable time limit:

Ala. Code (1940) t. 61, §§ 210 to 212. Six months after grant of letters; payment after that time is prohibited. Minors and persons of unsound mind have six months after appointment of guardians or removal of their disabilities.

Ark. Dig. Stat. (1937) § 93. One year after date of letters. See also description of this statute in group 2 below.

Cal. Prob. Code Ann. (Deering, 1944) §§ 700, 707. Six months after first publication of notice to creditors; creditor who shows he did not receive notice by reason of being out of the state may file at any time before decree of distribution is rendered.

Colo. Stat. (Supp. 1944) c. 176, § 207. Six months from grant of letters.

Del. Rev. Code (1935) § 3861 (amended Laws 1939, c. 142). One year from grant of letters; applies only to personal estate. See also description of this statute in group 3 below.

Fla. Stat. Ann. (1941) §§ 733.16, 733.17. Eight months from first publication of notice to creditors; defective filing may be amended at any time before payment.

Idaho Laws Ann. (1943) §§ 15-602, 15-604. Four months from first publication of notice to creditors; extension like California.

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 356. Nine months from issuance of letters; but if an inventory is filed after the nine

months, listing estate not previously inventoried, the creditor may file a claim against such assets.

Ind. Stat. (Burns, 1933) § 6-1001. At least thirty days before final settlement of the estate; and a claim not filed within six months of the notice to creditors must be prosecuted solely at the cost of the claimant.

Iowa Code (1939) § 11972 (amended Laws 1941, c. 301). Six months from giving of notice to creditors, unless peculiar circumstances entitle the claimant to equitable relief.

Kan. Gen. Stat. (Supp. 1943) § 59-2239. Nine months from first publication of notice to creditors; provisions of will requiring the payment of a demand exhibited later shall control.

Me. Rev. Stat. (1944) c. 152, §§ 15, 18, 20, 22. Twelve months after qualification of personal representative; a claim accruing after the period may be proceeded on within one year after it becomes due; a creditor who failed to file in time may petition for relief in equity.

Minn. Stat. (1941) §§ 525.41, 525.411. Four months from date of filing order fixing the time; for cause shown the court may allow a claim presented before final settlement and allowance of the representative's account and within one year after the date of the filing of the order to file claims.

Miss. Code (1942) § 566. Six months; apparently this means six months from first publication of notice to creditors.

Mo. Rev. Stat. Ann. (1942) § 75. One year from grant of letters; or if notice was not published within ten days from grant of letters, then one year from first publication of notice. See also description of this statute in group 2 below.

Nev. Comp. Laws (Supp. 1941) § 9882.120. Three months from first publication of notice to creditors; creditor who shows he had no notice may file at any time before the filing of the final account.

N. H. Rev. Laws (1942) c. 355, § 3. No action may be brought by a creditor unless the demand was exhibited within one year after the original grant of administration, exclusive of the time the administration may have been suspended. See also c. 355, §§ 5 and 28, requiring suits to be brought within two years after the original grant of administration, with a possible extension if the claimant is not chargeable with culpable neglect in failing to bring suit in time.

N. M. Stat. (1941) § 33-803. Six months from first notice of appointment of personal representative.

N. C. Gen. Stat. (1943) § 28-49. Six months after personal notice to creditor. See also description of this statute in group 3 below.

N. D. Rev. Code (1943) §§ 30-1802, 30-1804. Six months after first publication of notice to creditors.

Okla. Stat. (1941) t. 58, §§ 331, 333. Four months from first publication of notice to creditors; extension like California.

R. I. Gen. Laws (1938) c. 578, § 3 (amended Laws 1941, c. 1003). Six months from first publication of notice of appointment of personal representative; creditor who by reason of accident, mistake or other cause has failed to file may petition the court for leave to file at any time before distribution of the estate.

S. C. Code (Supp. 1944) § 8993. Eleven months after first publication of notice to creditors.

S. D. Code (1939) § 35.1404. Six months after first publication of notice to creditors; extension like California.

Tenn. Code (Michie, Supp. 1939) § 8196(1). One year from first publication of notice to creditors.

Wash. Rev. Stat. (1932) § 1477. Six months after first publication of notice to creditors.

Wyo. Rev. Stat. (1931) § 88-3101 (amended Laws 1943, c. 105), § 88-3103. Six months after first publication of notice to creditors; extension like California.

(b) Time limit depending on value of the estate:

Ariz. Code (1939) §§ 38-1001, 38-1003. Ten months after first publication of notice to creditors if estate exceeds \$5000; or four months if it does not; extension like California.

Mont. Rev. Code (1935) §§ 10171, 10173. Ten months after first publication of notice to creditors when the estate exceeds \$10,000; or four months when it does not; extension like California.

Utah Code (1943) §§ 102-9-2, 102-9-4. Four months from first publication of notice to creditors when estate exceeds \$10,000; or two months when it does not; extension like California.

(c) Time limit as ordered by the court within statutory limits:

Conn. Gen. Stat. (1930) § 4914. Not more than twelve months nor less than six months (apparently from the time the court makes

the order); cause of action which accrues after the time limited shall be exhibited within four months after it accrues; for cause shown the court may extend the time, not exceeding the period which it might have originally limited; if a creditor failed to file in time through no default of his own, the court may extend the time for such creditor, not more than thirty days beyond the period which it might have originally limited. Section 4925 has similar provisions for insolvent estates.

Mich. Stat. Ann. (1943) §§ 27.3178(412), 27.3178(428). Not less than two nor more than four months from the date of first publication of order; on application of a creditor who has failed to file, made within eighteen months of the time originally fixed and before the estate is closed, court may allow further time not exceeding one month; after eighteen months after the time originally fixed, no claim shall be allowed unless court determines failure was not due to any fault of the creditor.

Neb. Rev. Stat. (1943) §§ 30-603 to 30-605, 30-609. Such time as the circumstances of the case require, not over eighteen months nor less than three months; may extend the time as circumstances require, but not so that the whole time shall exceed two years; on application of a creditor who has failed to file, if made within three months after the expiration of the time previously allowed, the court may for good cause shown allow further time not exceeding three months.

Vt. Pub. Laws (1933) §§ 2838, 2839, 2842. Such time as the circumstances of the case require, not more than eighteen months nor less than six months; court may extend the time as circumstances require, but not so that the whole time exceeds two years; a creditor who failed to file through fraud, accident or mistake, or without fault on his part, may petition within two years from the appointment of commissioners and before final order of distribution has been made and before the estate has been fully distributed, and the court may then allow a further time not exceeding three months, but property which has been actually distributed at the time of such petition shall not be liable.

Wis. Stat. (1943) §§ 313.03, 313.08. Not less than four months nor more than one year from the date of the order; may be extended

but not beyond two years from the date of the letters upon application of a claimant filed not later than sixty days after the expiration of the time limited.

2. *Statutes postponing payment of claims not filed promptly.* Eight states have statutes of this type; two of these—Arkansas and Missouri—also bar creditors absolutely after a further lapse of time as indicated in part 1 above. In these two states, and also in New Jersey, Ohio, Oregon and Texas, payment to the non-filing claimant is postponed until all claims filed on time are paid; in Georgia, however, the non-filing creditor loses his right to participate with those of equal dignity, but presumably still comes ahead of creditors of a lower priority even if the latter have filed on time. In Pennsylvania the statute does not make clear whether the dilatory creditor may come in at a later accounting, but a dictum in one case indicates that he may. See Ray's Estate, 345 Pa. 210 at 216, 25 A. (2d) 803 (1942). In all the other states of this group the non-filing claimant can come in at any time before final distribution and reach any undistributed assets. The statutes are as follows:

Ark. Dig. Stat. (1937) § 93. Creditors who fail to file within six months after the date of letters "may be precluded from any benefit in the estate"; absolute bar after one year from date of letters.

Ga. Code Ann. (1936) § 113-1505. Creditors who fail to file within twelve months from date of qualification of personal representative "lose all rights to an equal participation with creditors of equal dignity to whom distribution is made before notice of such claims is brought to the administrator; nor can they hold the administrator liable for a misappropriation of the fund; if, however, there are assets in the hands of the administrator sufficient to pay such debts, and no claims of higher dignity are unpaid, the assets shall be thus appropriated, notwithstanding the failure to give notice."

Mo. Rev. Stat. Ann. (1942) § 75. Creditors who fail to file within six months after the date of letters "may be precluded from any benefit of such estate"; absolute bar after one year from date of letters.

N. J. Rev. Stat. (1937) §§ 3:25-3, 3:25-9, 3:25-10. Claims are barred after six months from date of order to present claims; but creditor may reach any estate he finds unaccounted for after the settlement of the final account of the personal representative.

Ohio Gen. Code (Page, Supp. 1945) § 10509-121. Preferred claims are paid first, then claims which were presented within four months after appointment of personal representative; then all other claims which were presented after four months from the appointment of the personal representative.

Ore. Comp. Laws (1940) § 19-702. A claim not presented within six months after first publication of notice to creditors cannot be paid until claims presented within that time are paid; until administration is completed a claim may be presented, allowed and paid out of any assets then in the hands of the personal representative and not otherwise appropriated or liable.

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 864. No creditor who fails to present his claim at the audit of the account of the personal representative, held not less than six months after the grant of letters, of which notice has been given, or at an audit held after actual notice to such creditor, shall be entitled to receive any share of the assets distributed in pursuance of such audit.

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3509, 3510. Claims shall be presented within one year after grant of letters, or payment shall be postponed until the claims which were presented within one year are entirely paid.

3. *Statutes protecting personal representative.* There are ten jurisdictions in this group, three of which also appear in other groups. Thus Georgia also appears in group 2 above; North Carolina creates an absolute bar as to creditors receiving personal notice, while Delaware protects the representative after six months and also creates an absolute bar after twelve months. (It should be noticed, however, that these Delaware statutes appear in the Revised Code in the chapter dealing with settlement of personal estates.) In the District of Columbia and Maryland the protection of the representative is dependent on his having given notice six months before paying out the assets, but in the other states there is no such prerequisite set out in the statute. Presumably the dilatory creditor in all of these states could reach any left-over assets, though the statutes do not so provide except in Kentucky, where such a creditor may proceed against the heirs and distributees. The statutes in this group are as follows:

Del. Rev. Code (1935) § 3838. If a representative, after six months from the grant of letters, without notice of a demand of higher grade, pays a demand of lower grade, such payment shall be allowed him. See also description of this statute in group 1 (a) above.

D. C. Code (1940) § 18-526. No representative who, after one year from the date of his letters, pays any claims shall be answerable for any claim which was not properly presented, provided that at least six months before he makes distribution he shall have given notice to creditors.

Ga. Code Ann. (1936) § 113-1505. See description of this statute in part 2 above.

Ky. Civ. Code (1938) §§ 433, 434. No time is stated; but creditors failing to file within the time specified by court order "shall have no claim against the executor or administrator who has actually paid out . . ." ; but a non-filing creditor may proceed against legatees and distributees.

Md. Code (1939) art. 93, § 116. No administrator who shall pay claims shall be answerable for any claim of which he had no notice, provided that at least six months before making distribution he gives notice to creditors.

Mass. Ann. Laws (Supp. 1944) c. 197, § 2. Representative may pay claims after six months after the approval of his bond, and shall not be personally liable to any creditor of whose claim he did not have notice.

N. Y. Surr. Ct. Act, §§ 207, 208. Claim day is to be at least six months from date of first publication of notice to creditors; if a claim is not presented within the time limited, or, if no notice is published, within seven months from date of issue of letters, the representative shall not be chargeable for any assets he has paid out for claims or for distribution to next of kin.

N. C. Gen. Stat. (1943) §§ 28-47, 28-113. Claim date is twelve months from first publication of notice to creditors; in an action brought on a claim which was not presented within the twelve months, the representative "shall not be chargeable for any assets that he may have paid" for claims, legacies or distributive shares before the com-

mencement of such action. See also description of this statute under group I above.

Va. Code (1942) §§ 5391, 5392. "A personal representative who, after twelve months from his qualification, pays a debt of the decedent, shall not thereby be personally liable for any debt or demand against the decedent of equal or superior dignity, whether it be of record or not, unless before such payment he shall have notice of such debt or demand." Liens are not affected by this provision.

W. Va. Code (1943) §§ 4148, 4169. Claim date is not less than six months from the date of the first publication of notice to creditors, nor more than eight months from the qualification of the personal representative; "if any personal representative after one year from the qualification of the first executor or administrator, and after the report of claims . . . shall pay any legacy . . . or distribute any of the estate . . . such personal representative shall not, on account of what is so paid or distributed, be personally liable for any debt or demand . . . unless, within the time fixed . . . such demand was duly presented."

II. ESTATES WHICH ARE NOT ADMINISTERED

It is not uncommon to bar claims if no administration is had upon the estate within a certain period after the death of the decedent. Coupled with such legislation is a provision to the effect that creditors can initiate administration. Although these statutes usually apply to both testate and intestate estates, the Rhode Island statute applies only to the latter. A few statutes merely save the decedent's real estate from the claims of creditors after the period has run, but most bar the claim entirely. Statutes protecting a bona fide purchaser after a certain period are not included here; nor are statutes which bar claimants in ancillary administration proceedings. In some states an absolute bar is created for the initiation of administration, and these statutes may bar creditors after this time; these statutes are collected in the appendix note for § 83. The various statutes under consideration here are as follows:

Colo. Stat. (1935) c. 176, §§ 75, 76. If letters testamentary or of administration are not issued within two years of decedent's death, "all claims of creditors shall be forever barred . . . shall not affect the lien

upon the encumbered property of any claim secured by valid recorded mortgage or deed of trust or by valid pledge accompanied by delivery of possession."

Fla. Stat. Ann. (1941) § 734.29. "After three years from the death of any person, his estate shall not be liable for any obligation or upon any cause of action unless letters testamentary or of administration shall have been taken out within said three years; provided, however, that the lien of any duly recorded mortgage and the lien of any person in possession of any personal property and the right to foreclose and enforce such mortgage or lien shall not be impaired or affected by the limitation imposed hereby, but the same shall bar the right to enforce any personal liability against the estate of the decedent. . . ."

Idaho Laws Ann. (1943) §§ 15-1401 to 15-1404. These sections provide for determination of heirship after two years have elapsed from the date of death of the decedent; administration of the estate is not contemplated. Creditors may file claims, but if none are filed the finding of heirship shall bar all claims, due or to become due, absolute or contingent. Liens are not affected by this provision.

Kan. Gen. Stat. (Supp. 1943) § 59-2239. "No creditor shall have any claim against or lien upon the property of a decedent other than liens existing at the date of his death, unless an executor or administrator of his estate has been appointed within one year after the death of the decedent and such creditor shall have exhibited his demand in the manner and within the time herein prescribed."

Mich. Stat. Ann. (1943) § 27.3178(430). "All debts and obligations of any person shall be barred after 6 years from the date of his death unless presented to the probate court as provided by law or unless sooner barred by law, notwithstanding that no proceedings shall have been taken to probate such estate."

Minn. Stat. (1941) § 525.431. "Except as provided in section 525.411 with reference to contingent claims, no claim against a decedent shall be a charge upon his estate unless filed in the probate court within five years after his death and within the time limited under section 525.41 or extended under section 525.411. Nothing in this section shall be construed as preventing an action to enforce a lien existing at the date of decedent's death nor as affecting the rights of a

creditor to recover from the next of kin, legatees, or devisees to the extent of the assets received, upon any claim not required to be filed by section 525.411, or upon any contingent claim arising upon contract which did not become absolute and capable of liquidation until after the time limited under section 525.41 or extended under section 525.411 or until five years after the death of the decedent."

Miss. Code (1942) § 539. If no administration is commenced within three years after death, no creditor is "entitled to a lien or any claim whatsoever on any real property of the decedent, or the proceeds therefrom, against purchasers or encumbrancers for value of the heirs of the decedent, unless such creditor shall within three years and six months from the date of the death of the decedent file on the lis pendens docket in the office of the clerk of the chancery court of the county in which said land is located notice of his claim. . . . But the provisions of this Act requiring the filing of notice shall not apply to any secured creditor having a recorded lien on said property."

Mo. Rev. Stat. Ann. (1942) § 179. "When no administration shall be had on the estate of a person who shall die owning land in this state, such land shall not be taken or sold for any claims or debts against such person or estate after ten years from the death of such person, but shall be free and clear therefrom."

Neb. Rev. Stat. (1943) § 30-609. If a claimant fails for two years from the death of the decedent to apply for or take out letters of administration, "then such claim or demand shall likewise be forever barred. This section shall not be construed to limit or affect the time within which a person may enforce any lien against property, real or personal, of such deceased person, nor shall it be construed to affect actions pending against the deceased at the time of his death." But see §§ 30-1701 to 30-1708, containing provisions similar to Idaho, described above.

Nev. Comp. Laws (1929) § 8534. "No real estate of a deceased person shall be liable for his debts other than recorded incumbrances, unless letters testamentary or of administration be granted within three years from the date of the death of such decedent."

N. H. Rev. Laws (1942) c. 355, § 29. "If no administration shall have been granted upon the estate of a deceased person within two

years from the date of death, no creditor of the deceased shall thereafter be entitled to maintain any action or proceeding in any court to appropriate the real estate or interests therein of which the deceased died seized, to the payment or satisfaction in whole or in part of his claim against the estate."

N. M. Stat. (1941) § 33-804. "If any person shall die seized or possessed of any real estate in this state, and no letters of administration or letters testamentary shall issue on the estate of the decedent within six [6] years from the date of such death, all claims of creditors shall be forever barred . . . except in the case of judgment liens or liens secured by mortgage deed or deed of trust which shall in no wise be affected by this act."

R. I. Gen. Laws (1938) c. 579, § 30. "Any creditor or creditors of any deceased person who shall have died intestate being seized at the time of his or her death of real estate within the state of Rhode Island, and upon whose estate no letters of administration shall have been taken, shall be forever barred from collecting their claim or claims against the estate of such deceased person, unless they shall, within the period of 6 years of the death of such person, petition . . . for letters; . . . nothing in this section shall be construed to affect the right of any such creditor to satisfy his said claim from any security held by him."

Wash. Rev. Stat. (1932) § 1368. "No real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent: Provided, however, That this section shall not affect the lien of any mortgage, upon specific real property, existing and recorded as required by law at the date of the death of such decedent."

Wis. Stat. (1943) § 316.01, subd. 2. "No debt of or claim against any deceased person, which was not a lien upon his real estate before his death, shall be a lien upon or valid claim against any such real estate for the payment of which it can be sold by an executor or administrator after three years from the death of such decedent, except in the following cases:

"(a) When such claim is created or charged upon such real estate by a will.

“(b) When letters testamentary upon the will or of administration of the estate of such decedent issued in this state within such three years and such claim is duly presented to the county court which issued such letters.

“(c) When delay in issuing letters is caused by an appeal from the county court which suspends the proceedings therein, the time of such delay shall not be counted as any part of said three years.”

Wyo. Laws 1945, c. 69. If letters testamentary or of administration are not applied for within two years after the death of the decedent, “all claims of creditors shall be forever barred . . . provided that this Act shall not affect the lien upon encumbered property secured by valid mortgage or deed of trust in the case of real property, or by valid pledge accompanied by delivery of possession or by chattel mortgage or by conditional sale in case of personal property.”

§§ 172-181. ACCOUNTING IN DECEDENTS' ESTATES

1. *Liability of personal representative.* Provisions are found in many states defining the accountability of the personal representative; these statutes commonly contain provisions similar to § 172 of the Model Probate Code. Since these statutes are more or less similar, and since they do not present any controversial matters, it has not been deemed necessary to list them completely; examples of such statutes are Cal. Prob. Code Ann. (Deering, 1944) § 920; Idaho Laws Ann. (1943) §§ 15-1102 to 15-1104; Ind. Stat. (Burns, 1933) § 6-1403; Iowa Code (1939) §§ 12046, 12048; Me. Rev. Stat. (1944) c. 141, §§ 65, 70, 71; Mass. Ann. Laws (1932) c. 206, §§ 5, 6; Ohio Gen. Code (Page, 1937) §§ 10509-172 to 10509-174.

2. *Duty to close estate.* A few states require the final account to be filed within a given time, as follows:

Ark. Dig. Stat. (1937) § 209. Within eighteen months from date of letters, but the court may grant an extension for good cause shown.

Del. Rev. Code (1935) § 3852. One year from date of letters.

Ind. Stat. (Burns, 1933) § 6-1401. At end of one year from date of letters unless excused for cause by the court. See also § 6-1415.

Iowa Code (1939) § 12044. Within three years unless otherwise ordered by court.

Kan. Gen. Stat. (Supp. 1943) § 59-1501. One year from date of appointment; may be extended by court, not to exceed one year at a time.

Mich. Stat. Ann. (1943) § 27.3178(286). As promptly as possible unless for good cause shown the court extends the time, not exceeding ten years.

Minn. Stat. (1941) § 525.47. One year from date of appointment; may be extended by court, not to exceed one year at a time.

Mo. Rev. Stat. Ann. (1942) § 229. At first regular term of court after the expiration of one year from the date of granting the first letters on the estate, unless further time is given by the court.

Neb. Rev. Stat. (1943) § 30-1409. At expiration of the year from the time of granting letters, unless otherwise expressly permitted by law; if by reason of a suit pending by reason of which full settlement cannot be had, settlement shall be had as far as may be, and the administration may be continued only to contest such suits to a full settlement.

N. C. Gen. Stat. (1943) § 28-121. A final account may be required any time after two years from the qualification of the personal representative.

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3320. Within three years from the grant of letters unless extended by the court after a satisfactory showing.

Wis. Stat. (1943) § 313.13. Within sixty days after entry of final order on claims filed, unless specified causes of delay exist.

3. *When personal representative must account.* It is commonly provided that the personal representative must account when his authority ceases or is revoked for any reason, e.g., Ariz. Code (1939) § 38-1307, or upon resignation, e.g., Colo. Stat. (1935) c. 176, § 92. It is also common to require an accounting upon a sale, e.g., Ala. Code (1940) t. 61, § 241; Idaho Laws Ann. (1943) § 15-744. These and other special rules will not be listed here; rather, the following summary will mention only the normal times for accounting.

Ala. Code (1940) t. 61, §§ 197, 293, 294. Six months after appointment and any time thereafter when required by the court; annually, and at any time when necessary for the interests of the estate;

final settlement may be any time after six months from the grant of letters.

Ariz. Code (1939) §§ 38-1301, 38-1305, 38-1306. Six months after appointment and thereafter when required by the court; within thirty days after expiration of the nonclaim period; annually.

Ark. Dig. Stat. (1937) § 182. At first term of court after one year from date of letters, and at corresponding term every year.

Cal. Prob. Code Ann. (Deering, 1944) §§ 921, 922, 1063. Whenever required by the court; within thirty days after expiration of the nonclaim period; annually.

Colo. Stat. (1935) c. 176, § 217. At first term of court after expiration of six months from date of letters, and every six months thereafter, or oftener if required by the court.

Conn. Gen. Stat. (Supp. 1943) § 673g. Annually; but not required if estate is less than \$2000.

Del. Rev. Code (1935) § 3843. Every year; register may extend the time, not exceeding six months, or dispense with the account if it appears that there are no transactions to report.

D. C. Code (1940) §§ 20-601, 20-602, 20-203, 20-303. Within twelve months from date of letters, then from time to time under court rules. A personal representative who is entitled to the residue need not account.

Fla. Stat. Ann. (1941) § 733.43. Annually, unless otherwise ordered by the court.

Ga. Code Ann. (Supp. 1943) §§ 113-1415 to 113-1417. Within sixty days after anniversary date of qualification, in each year; an optional intermediate final report may be filed every three years.

Idaho Laws Ann. (1943) § 15-1108. When required by the court.

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 443. Within sixty days after nine months after issuance of letters, or within such further time as the court allows; thereafter when required by the court.

Ind. Stat. (Burns, 1933) §§ 6-1401, 6-1415. After six months from date of giving notice of appointment a final account may be filed if court consents; after one year from notice of appointment, court may order further accounting.

Iowa Code (1939) §§ 12042, 12043. On expiration of six and within seven months from first publication of notice of appointment, and sooner if required by the court; also from time to time as required by the court.

Kan. Gen. Stat. (Supp. 1943) §§ 59-1501, 59-1502. Within one year from date of appointment, and at such other times as the court may require.

Ky. Rev. Stat. (1944) § 25.175. One year after appointment and annually thereafter unless otherwise provided by law; and at any other time on order of the court.

Me. Rev. Stat. (1944) c. 141, §§ 11, 22; c. 144, § 21. Within one year and at any other time when required by the court; if account is not settled within six months after the report on claims, or within such further time as the court allows, it is a breach of the bond.

Md. Code (1939) art. 93, §§ 1 to 3. Within twelve months from date of letters; within every six months thereafter, and within six months after discovery or receipt of assets; the court may allow further time, not exceeding six months.

Mass. Ann. Laws (1932) c. 206, § 1. At least once a year and at such other time as required by the court; court may excuse an account in any year if satisfied that it is not necessary or expedient.

Mich. Stat. Ann. (1943) §§ 27.3178(286), 27.3178(289). Court may require an accounting at any time; at least once a year, or oftener if the court directs.

Minn. Stat. (1941) § 525.48. Within one year from date of appointment, and at such other times as the court may require.

Miss. Code (1942) § 631. At least once a year, or oftener if required by the court; the court may extend the time.

Mo. Rev. Stat. Ann. (1942) § 213. At first term of court after end of six months from date of letters, and at first term after one year from date of letters, and at the corresponding term every year thereafter.

Mont. Rev. Code (1935) §§ 10288, 10294. Six months after appointment, and at any time when required by the court; within thirty days after expiration of the nonclaim period.

Neb. Rev. Stat. (1943) §§ 30-1409, 30-1413. Within one year from receiving letters unless the court permits a delay; also from

time to time as required by the court; personal representative may be cited to account any time after six months from the time of receiving letters.

Nev. Comp. Laws (Supp. 1941) §§ 9882.212, 9882.213. Within thirty days after the judge has acted on claims filed; also whenever required by the court.

N. H. Rev. Laws (1942) c. 352, § 13. Within one year.

N. J. Rev. Stat. (1937) §§ 3:10-1, 3:10-2, 3:10-5. Within one year after appointment, or within thirty days after such year has expired, unless the court for good cause allows more time; no account is necessary when executor or administrator is entitled to the residue, unless ordered to do so.

N. M. Stat. (1941) § 33-1201. On expiration of six months and within seven months from date of appointment, and sooner if required by court; and from time to time as may be convenient and whenever required by the court.

N. Y. Surr. Ct. Act, §§ 257-a, 258, 261. Court may require accounting after fifteen months after letters were issued; also fifteen days after nonclaim period has expired, or seven months after letters were issued, or after one year has elapsed without an accounting.

N. C. Gen. Stat. (1943) § 28-117. Within twelve months from date of qualification, and annually.

N. D. Rev. Code (1943) § 30-2001. At expiration of six months after letters issue, at expiration of one year after letters issue, and at any time required by the court.

Ohio Gen. Code (Page, Supp. 1945) § 10506-34. Within nine months after appointment, and at least once a year thereafter, and at any time on order of the court.

Okla. Stat. (1941) t. 58, §§ 234, 541, 547. At least once each year; at any time required by the court; at expiration of one year from the time of appointment.

Ore. Comp. Laws (1940) § 19-1001. Within the first ten days of April and October each year.

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 831. At expiration of six months from time of administration granted, or when required by the court.

R. I. Gen. Laws (1938) c. 580, § 1. Within two years after qualification and thereafter at least once a year, and when required by the court.

S. C. Code (Supp. 1944) § 9012. On the first day after expiration of eleven months from date of appointment, and every twelve months thereafter; court may excuse delay, or extend the time.

S. D. Code (1939) §§ 35.1604, 35.1606. Within ninety days after appointment, and thereafter when required by the court; at expiration of one year from appointment.

Tenn. Code (Michie, 1938) § 8244. After eighteen months from qualification, and once a year thereafter.

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3320, 3537, 3542. Annually; at first term of court after twelve months from original grant of letters; at the third regular term after twelve months from the original grant of letters, or at any term thereafter, any interested person may compel an exhibit of the condition of the estate.

Utah Code (1943) § 102-11-32. Six months after appointment, also within thirty days after expiration of nonclaim period, also when required by the court.

Vt. Pub. Laws (1933) § 2809. Within one year from time of receiving letters unless the court extends the time; also when required by the court.

Va. Code (1942) §§ 5408, 5409a. Annually, within six months after the end of each year; with estates under \$500, an account is required only every three years after the first year.

Wash. Rev. Stat. (1932) § 1529. Within thirty days after expiration of nonclaim period.

W. Va. Code (1942) § 4185. Annually, within four months after the end of each year.

Wis. Stat. (1943) §§ 313.13, 317.05. Within sixty days after entry of final order on claims filed, and from time to time as ordered by the court.

Wyo. Rev. Stat. (1931) §§ 88-2701 (amended Laws 1943, c. 105, § 4), 88-2702. Six months after appointment and at end of each year thereafter; any interested person may petition for an accounting any time after expiration of the nonclaim period.

4. *What accounts to contain.* Statutes exhibit considerable variation in their directions as to the contents of accounts. Thus the Delaware statute merely requires an account in Federal money, Del. Rev. Code (1935) § 3843, while at the other extreme the Maryland statute lists specifically the items which must appear in the account. Md. Code (1939) art. 93, §§ 4, 5. A common type of statute requires a showing of all money received and expended, all claims presented and the names of the claimants, and all other matters necessary to show the condition of the estate's affairs. See Ariz. Code (1939) § 38-1301. In Florida the statute requires a full and correct account of receipts and expenditures, together with a statement of the assets of the estate. Fla. Stat. Ann. (1941) § 733.44. A few states require a listing of investments and changes of investments, e.g., Mass. Ann. Laws (1932) c. 206, § 2.

5. *Conclusiveness of order settling account.* Several states are silent as to the conclusive effect of the settlement of accounts; no statutes were found in Colorado, Connecticut, District of Columbia, Maine, Maryland, Minnesota, Nebraska, New Hampshire, South Carolina, Texas, Vermont or Washington. In all other states some provision exists. Thus in one group of states there is a statute similar to the following, which is Cal. Prob. Code Ann. (Deering, 1944) § 931: "The order settling and allowing the account, when it becomes final, is conclusive against all persons interested in the estate, saving, however, to persons under legal disability, the right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator or his sureties, at any time before final distribution; and in any such action such order is prima facie evidence of the correctness of the account." Other statutes of this type are Ariz. Code (1939) § 38-1313; Idaho Laws Ann. (1943) § 15-1120 (but persons under disability may bring suit within two years after their disabilities cease); Mont. Rev. Code (1935) § 10303 (but decree may be reopened or set aside within sixty days after its rendition in case of inadvertence, or within sixty days after discovery of facts constituting fraud); Nev. Comp. Laws (Supp. 1941) § 9882.219; N. D. Rev. Code (1943) § 30-2016 (see also § 30-2014, providing that any matter not concluded on the settlement of a former account or in any other proceeding may be

contested for cause shown); Okla. Stat. (1941) t. 58, § 556; S. D. Code (1939) § 35.1616; Utah Code (1943) § 102-11-37; Wyo. Rev. Stat. (1931) § 88-2711.

In another group of states it is simply provided that the decree is evidence, or *prima facie* evidence. These are Del. Rev. Code (1935) § 3844; Ky. Rev. Stat. (1944) § 25.200 (between the parties interested); N. C. Gen. Stat. (1943) § 28-117; Ore. Comp. Laws (1940) § 19-1006 (applies only to final account); Tenn. Code (Michie, 1938) § 8254 (in favor of the accounting party); Wis. Stat. (1943) § 287.26. And in Georgia also it is *prima facie* evidence, Ga. Code Ann. (1936) § 113-1411, but in addition it is provided that an intermediate final report—which is optional with the personal representative and which may be filed every three years—binds all parties in interest in the absence of fraud, accident or mistake, Ga. Code Ann. (Supp. 1943) § 113-1424; and by § 113-2201 a settlement at the instance of an interested party is conclusive on the administrator and on all distributees present at the hearing.

In Alabama any item in a previous settlement may be re-examined on the final account, but its allowance on the previous settlement is presumptive evidence of its correctness; in addition, an accounting upon notice is final and conclusive as to all items shown therein except that it may be reopened prior to the final settlement for fraud or mistake. Ala. Code (1940) t. 61, §§ 314, 315. Other statutes permitting a re-examination of prior accounts are Ind. Stat. (Burns, 1933) § 6-1409; Miss. Code (1942) § 641; R. I. Gen. Laws (1938) c. 580, § 9 (to correct mistake or error apparent therein); W. Va. Code (1943) § 4189.

In a few other states an account may be reopened, as follows: Iowa Code (1939) §§ 12049, 12051 (mistake may be corrected any time before discharge, or afterwards by equitable proceedings; and accounts settled without notice to a person adversely interested may be reopened within three months); Miss. Code (1942) § 646 (may be reopened within two years, with a similar time after removal of disabilities for persons under disability); Pa. Stat. Ann. (Purdon, 1930) t. 20, § 843 (within five years after decree); Va. Code (Supp. 1944) § 5429 (as to persons not parties to exceptions filed to the report).

In several states the decree is conclusive in the absence of fraud or mistake. Ark. Dig. Stat. (1937) § 189 (fraud); Ill. Ann. Stat. (Smith-Hurd, Supp. 1944) c. 3, § 444 (fraud, accident or mistake); Mich. Stat. Ann. (1943) § 27.3178(290) (fraudulent concealment or misrepresentation); N. J. Rev. Stat. (1937) § 3:10-18 (fraud or mistake).

In Florida it is provided that no item previously approved on notice shall be subject to objection, Fla. Stat. Ann. (1941) § 733.45, and in New York the judicial settlement of an account is conclusive evidence against all persons of whom jurisdiction was obtained and persons deriving title from them. N. Y. Surr. Ct. Act, § 274. In West Virginia it is binding on creditors and every beneficiary who had notice. W. Va. Code (1943) § 4201. In Kansas, Missouri and New Mexico the decree allowing the final account and ordering distribution is conclusive. Kan. Gen. Stat. (Supp. 1943) § 59-2249; Mo. Rev. Stat. Ann. (1942) § 230; N. M. Stat. (1941) § 33-1212.

§ 182. PARTIAL DISTRIBUTION

Provisions for distribution of specific property and for pro rata distribution of the whole estate are common. Some states provide for both types of distribution, while some provide for only one or the other. Usually distribution may be made only after a lapse of time, either a certain number of months after the issuance of letters testamentary or after the nonclaim period has elapsed. In California, for example, specific property may be distributed after four months from the issuance of letters, but pro rata distribution may be made when the nonclaim period has expired. This period is six months after publication of notice to creditors. Cal. Prob. Code Ann. (Deering, 1944) §§ 1000, 1010. In Ohio a specific legacy may apparently be paid at any time, but partial distribution may be had only when six months have expired from the appointment of the representative and one month from the approval of the inventory. After nine months from the appointment of the executor or administrator, a legatee or distributee may petition for partial distribution. Ohio Gen. Code (Page, 1937 and Supp. 1944) §§ 10509-180 to 10509-182. Texas likewise permits delivery of specific property at any time. The pertinent statute reads as follows: "Any devisee or legatee may obtain

from the county judge of the county where the will was proved an order for the executor or administrator to deliver to him the property devised or bequeathed, provided that there will remain in the hands of such executor or administrator, after such delivery, a sufficient amount of the estate for the payment of all debts against said estate. Such devisee shall first cause the executor or administrator, and the other devisees or legatees, if any, and the heirs, if any, to be cited to appear and show cause why such order should not be made." Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3450.

Frequently a showing must be made that claims have been paid or that there are sufficient assets on hand for that purpose. New York has an elaborate provision that the amount on hand must exceed "by at least one-third the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim, and of all legacies or distributive shares of the same class." N. Y. Surr. Ct. Act, § 221. A simpler provision is found in Nevada, where distribution of specific property may be made on a showing "that the estate is but little indebted and that the share . . . may be allowed, without injury to the creditors of the estate." Nev. Comp. Laws (Supp. 1941) § 9882.238. Kansas seems to have no provision for the protection of creditors on a partial distribution. Minnesota requires that the inheritance taxes on the property distributed shall have been paid. Minn. Stat. (1941) § 525.482.

In the majority of the states a bond must be filed by the distributee, though this is sometimes left to the discretion of the court. In California the distributee of specific property must give bond unless the court dispenses with it, but there is apparently no such requirement for pro rata distribution. Cal. Prob. Code Ann. (Deering, 1944) § 1001.

Most states are silent as to the conclusiveness of an order for partial distribution. In California the pro rata distribution "is a full discharge of the executor or administrator . . . and when the order becomes final it binds and concludes all parties in interest." Cal. Prob. Code (1941) § 1012. (In Deering's Probate Code of 1941 and 1944 the word "includes" is substituted for "concludes.") There is no provision for the finality of an order for distribution of specific property. In Florida the order is conclusive as to bona fide purchasers from the

distributees unless revoked or unless reversed on appeal. Fla. Stat. Ann. (1941) § 734.03. Kansas provides that a decree for partial distribution made on notice "shall be final as to the persons entitled to such distribution and as to their respective proportions of the whole estate, unless such decree includes only specific legacies." Kan. Gen. Stat. (Supp. 1943) § 59-2246. The Minnesota provision is similar, but states that "such decree shall be final as to the persons entitled to such distribution and as to their proportions, and except where such decree includes only specific bequests or devises, as to the persons entitled to, and their proportions of the whole estate." Minn. Stat. (1941) § 525.482.

In Mississippi the only provision for partial distribution is for the maintenance and support of a minor legatee or distributee who has no guardian. Miss. Code (1942) § 565. Likewise in New York, the petitioner must show that he is "in actual need" of the property for support and education of himself or of his family. N. Y. Surr. Ct. Act, § 221. In Missouri, appropriations may be made for the support of minor children of decedent, but this is not a prerequisite to partial distribution. Mo. Rev. Stat. Ann. (1942) §§ 235, 236, 247.

§ 183. FINAL DISTRIBUTION

This discussion of statutes on final distribution will take up the following points: (1) conclusiveness of the decree; (2) whether it includes real estate, and if so, whether it is to be recorded as a muniment of title; (3) provisions for distribution to the assignee of a distributee, and to the heir of a deceased distributee; (4) provisions for payment of inheritance taxes.

1. *Conclusiveness of decree.* Provisions regarding the conclusiveness of the decree of distribution are fairly common. Idaho provides that "such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal." Idaho Laws Ann. (1943) § 15-1307. Similar language is found in Ariz. Code (1939) § 38-1505; Mont. Rev. Code (1935) § 10328; Okla. Stat. (1941) t. 58, § 632; S. D. Code (1939) § 35.1708. Cal. Prob. Code Ann. (Deering, 1944) § 1021 is similar except that it does not mention appeal. Mo. Rev. Stat. Ann. (1942)

§ 230 makes the decree "conclusive on all persons claiming thereunder, subject to the right of appeal as provided by law," and Utah Code (1943) § 102-12-9 states that the decree is "binding on all parties interested in the estate," subject to appeal. N. M. Stat. (1941) § 33-1212 makes it "final and conclusive in the distribution of said estate and in regard to the title to all property of the estate of said decedent." Under the provisions of Kan. Gen. Stat. (Supp. 1943) § 59-2249, the decree is "binding as to all the estate of the decedent, whether specifically described in the proceedings or not." According to Wis. Stat. (1943) § 318.06, subd. 3, "any finding or determination as to heirship or assignment of real estate in any such judgment shall be presumptive evidence of any fact so found and of the right to the portion of any estate so assigned and shall be conclusive evidence thereof as to all persons to whom notice shall have been given as provided in section 324.18, or who have appeared in any such proceeding and as to all persons claiming under them." Though there seems to be no provision for the conclusiveness of the decree in Minnesota, provision is made in Minn. Stat. (1941) § 525.481 for an interlocutory decree before the determination of inheritance taxes, and such a decree "shall be final as to the persons entitled to distribution, and as to the part or portion of the estate each is entitled to receive, but it shall not have the effect of assigning the estate to such persons."

2. *Does the decree of distribution include real estate?* The Oregon statute, Ore. Comp. Laws (1940) § 19-1202, states explicitly that realty passes "without any order or decree therefor," and in several other states it is fairly clear from the wording of the statute that the decree of distribution does not include realty. In a number of states, on the other hand, the statutes either declare or necessarily imply that real estate is to be included in the decree. Thus in Kansas it is stipulated that "the court shall determine the heirs, devisees, and legatees entitled to the estate and assign the same to them by its decree. The decree shall name the heirs, devisees, and legatees, describe the property, and state the proportion or part thereof to which each is entitled." Kan. Gen. Stat. (Supp. 1943) § 59-2249. In Wisconsin the section dealing with final distribution "shall apply to all real estate described in any such judgment [of final distribution] whether or

not in the possession of the executor or administrator, and such judgment shall describe the real estate to be assigned." Wis. Stat. (1943) § 318.06, subd. 4.

Several states have statutes substantially like the following California provisions, taken from Cal. Prob. Code Ann. (Deering, 1944):

§ 1020. ". . . The court must proceed to distribute the residue of the estate among the persons entitled thereto"

§ 1021. "In its decree, the court must name the persons and the proportions or parts to which each is entitled"

§ 1222. "When an order is made . . . making distribution of real property, . . . a certified copy thereof must be recorded in the office of the county recorder of each county in which the land, or any part thereof, lies; and from the time of filing the same for record, notice is imparted to all persons of the contents thereof."

These three sections make it clear that the decree of distribution includes realty. Similar statutes are found in the following states; in each case the provision for recording is listed last. Ariz. Code (1939) §§ 38-1504, 38-1505, 38-2008; Idaho Laws Ann. (1943) §§ 15-1306, 15-1307, 15-1515; Mich. Stat. Ann. (1943) § 27.3178(165), 27.3178(166), 27.3178(108); Minn. Stat. (1941) §§ 525.481, 525.483; Mont. Rev. Code (1935) §§ 10327, 10328, 10371; Neb. Rev. Stat. (1943) §§ 30-1303, 30-1302; Nev. Comp. Laws (Supp. 1941) §§ 9882.243, 9882.244, 9882.233; N. D. Rev. Code (1943) §§ 30-2110, 30-2111; Okla. Stat. (1941) t. 58, §§ 631, 632, 711; S. D. Code (1939) §§ 35.1705, 35.1708, 35.0117; Utah Code (1943) §§ 102-12-7, 102-12-8, 102-14-16; Vt. Pub. Laws (1933) §§ 2974, 3000; Wyo. Rev. Stat. (1931) §§ 88-3601, 88-3602, 88-901.

In addition to these states which follow the California pattern, provisions for recording appear also in Conn. Gen. Stat. (1930) § 4989; Kan. Gen. Stat. (Supp. 1943) § 59-2249; Wis. Stat. (1943) §§ 318.06, 318.065.

3. *Distribution to assignee or heir of distributee.* Statutes in a few states provide for distribution to the assignee of an heir or devisee. The former California Code provision declared that "partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have

conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees." Cal. Code Civ. Proc. (1906) § 1678. An early case asserted that the purpose of this provision was to put the alienee upon the same footing as the heir or devisee. *Estate of De Castro v. Barry*, 18 Cal. 97 (1861). The statute was copied in the states which usually follow the California pattern. Ariz. Code (1939) § 38-1604; Idaho Laws Ann. (1943) § 15-1315; Mont. Rev. Code (1935) § 10337; N. D. Rev. Code (1943) § 30-2122 (also covers personal property); Okla. Stat. (1941) t. 58, § 644; S. D. Code (1939) § 35.1716; Utah Code (1943) § 102-12-15; Wyo. Rev. Code (1931) § 88-3804. Cf. Nev. Comp. Laws (Supp. 1941) §§ 9882.235, 9882.243. It is settled that under this type of statute the court of probate has no jurisdiction to try a disputed assignment in making distribution. *Church v. Quiner*, 31 Wyo. 222, 224 P. 1073 (1924) and cases cited therein. It has also been held that this provision does not authorize the court of probate to distribute land to the assignee unless his interest was conveyed to him by instrument in form of a valid deed. *Maconchy v. Delehanty*, 11 Ariz. 366, 95 P. 109 (1908). As to the probate court's power to distribute to the judgment creditor of the heir or devisee, compare *Martinovich v. Marsicano*, 137 Cal. 354, 70 P. 459 (1902) with *Snyder v. Murdock*, 26 Utah 233, 73 P. 22 (1903). Even under distribution statutes which do not mention assignees it has been held proper to give effect in the probate court to agreements between the heirs as to division of the property. *Myers v. Noble*, 141 Kan. 432, 41 P. (2d) 1021, 97 A. L. R. 463 (1935); cf. *Schaefer v. Thoeny*, 199 Minn. 610 at 615, 273 N. W. 190 (1937). And see *Hotchkiss' Appeal*, 89 Conn. 420, 95 A. 26 (1915) (unusual statute). The present California provisions permit the assignee to petition for distribution and also allow the court to pass on the validity of the agreement in the proceedings for distribution. Cal. Prob. Code Ann. (Deering, 1944) §§ 1020, 1020.1. Under the former New York statute authorizing the surrogate "to ascertain the title to any legacy or distributive share," it was held that the surrogate had jurisdiction to adjudge a disputed assignment. *Hull v. Hull*, 225 N. Y. 342, 122 N. E. 252 (1919). The present New York law is

much more vague as to the existence of this power in the surrogate. N. Y. Surr. Ct. Act, §§ 40, 267. See generally 3 Woerner, Administration (3d ed., 1923) § 563.

In addition to the provision for assignment of a share, California also provides that in case of death of a distributee pending administration, his share shall be paid to his representative or his estate, "with the same effect as if it had been distributed to him while living." Cal. Prob. Code Ann. (Deering, 1944) § 1023. There is a similar provision in Idaho Laws Ann. (1943) § 15-1310. The group of states which has copied the Field Code provides for the case when a minor child of the decedent dies intestate and unmarried before the close of administration. The following provision is taken from Mont. Rev. Code (1935) § 10327, and is typical of this group: "If the decedent has left a surviving child and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law." A similar statute is found in Idaho Laws Ann. (1943) § 15-1306; N. D. Rev. Code (1943) § 30-2106; Okla. Stat. (1941) t. 58, § 631; S. D. Code (1939) § 35.1705; Wyo. Rev. Stat. (1931) §.88-3601. Ariz. Code (1939) § 38-1504 and Utah Code (1943) § 102-12-7 are similar except that the share goes to the child's heirs instead of "the other heirs." In most cases, of course, the heirs of the child will be the same as those of his parent, but there might conceivably be cases in which the variation of statutory language would become significant.

4. *Payment of inheritance taxes.* Very few states make payment of inheritance taxes a prerequisite to final distribution. Kan. Gen. Stat. (Supp. 1943) § 59-2249 provides that "no final decree shall be entered until after the determination and payment of inheritance taxes." Minn. Stat. (1941) § 525.481 has a similar provision. See also Cal. Prob. Code Ann. (Deering, 1944) § 1024; Fla. Stat. Ann. (1941) § 734.04; Idaho Laws Ann. (1943) § 15-1311. California and Idaho also require payment of personal property taxes. Several other states, though silent as to inheritance taxes, require the payment

of "state, county and municipal taxes on personal property" before distribution may be decreed. This group includes those states whose probate law is modeled on the Field Code. See Mont. Rev. Code (1935) § 10331; N. D. Rev. Code (1943) § 30-2109; Okla. Stat. (1941) t. 58, § 635; S. D. Code (1939) § 35.1710; Utah Code (1943) § 102-12-10. Arizona and Wyoming require the payment of such taxes "upon the property of the estate," and this language presumably refers to taxes on real as well as on personal property. Ariz. Code (1939) § 38-1505; Wyo. Rev. Stat. (1931) § 88-3603. It should be noted that an inheritance tax is considered as an excise tax and not a property tax; therefore provisions requiring the payment of property taxes do not apply to inheritance taxes.

§ 184. ABATEMENT

I. IN GENERAL

The common-law rule of abatement was that personalty alone was liable for debts (with certain exceptions not material here) and that it abated in the following order: (1) intestate estate; (2) residuary legacies; (3) general legacies; (4) specific legacies. Probably realty is now liable in every state, either under statutory provision or by judicial decision, but in many states personalty remains primarily liable, and real estate may be resorted to only after the personal property has been exhausted. In other states personalty precedes realty only within each class, and in still others there is no priority between the real and personal estate. As to abatement between devises of land and legacies, see annotation in 42 A. L. R. 1519. As to abatement in case of spouse's election against the will, see annotation in 99 A. L. R. 1187. As to testator's intention regarding abatement as disclosed by various factors, see comment, 36 Mich. L. Rev. 297 (1937); annotations in 34 A. L. R. 1247, 101 A. L. R. 704, 117 A. L. R. 1339. Generally see 4 Page, Wills (3d ed., 1941) c. 42; 3 Woerner, Administration (3d ed., 1923) § 452.

An investigation of the statutes on abatement reveals considerable variation regarding the order of abatement. Some have adopted the common-law rule without change; some merely provide that intestate property shall be taken before testate property. Some set up a rule

that personalty shall be taken first, followed by undevised realty and lastly by devised realty. Some provide merely that specific devises and/or legacies shall be taken last. Some provide that a specific legacy or a pecuniary legacy shall be taken from the real estate when necessary. In a few states there seem to be no statutory provisions whatever, and this presumably leaves the common-law rule in force.

There are a few groups of states whose statutes are similar. Thus Montana, North Dakota, Oklahoma and South Dakota provide that property shall be resorted to for the payment of debts in the following order: (1) property appropriated by the will; (2) property not disposed of by will; (3) property devised or bequeathed to residuary legatees; (4) property not specifically devised or bequeathed; (5) all other property ratably; as to resort for the payment of legacies, the order is (1) property appropriated by the will; (2) property not disposed of by will; (3) property devised or bequeathed to residuary legatees; (4) property not specifically devised or bequeathed. It is further provided in these states that there is no priority as between real and personal estate, and that legacies to a spouse or kindred of any class are chargeable only after legacies to persons not related to testator, and that abatement takes place in any class only as between legacies of that class unless the will indicates another intention. In Arizona and Idaho there is no provision that abatement takes place in any class only as between legacies of that class, nor does Arizona list the specific order of abatement, but otherwise these two states belong to this group. Likewise California and Nevada, though different in details, are substantially like the statutes of this group.

In another group of jurisdictions the only provision is that realty may be sold to pay debts if there is not sufficient personalty. These jurisdictions are Arkansas, Delaware, District of Columbia, Iowa, Mississippi (also provides that realty may be sold in preference to personalty when it is for the best interest of the distributees or legatees), New Jersey, New Mexico, South Carolina and Tennessee.

A few other states require personalty to be taken first, then undevised realty before devised realty. These states are Indiana, Maine, Massachusetts, Nebraska (also saves specific legacies and devises), North Carolina (also saves specific devise of land), Ohio (also saves specific devises and legacies), Rhode Island and Vermont.

Beyond these groupings, the statutes exhibit great variation; therefore the statutes not already discussed will be briefly summarized. The entire list of statutes is as follows:

Ala. Code (1940) t. 61, §§ 6, 243, 252, 277. Lands may be sold to pay debts only on a showing that the personal estate is insufficient therefor. Land may be sold to pay pecuniary legacies which expressly or by necessary implication are a charge on such land. A residuary devise of land is a general, not a special devise.

Ariz. Code (1939) §§ 38-1201, 38-1228, 38-1229. See discussion preceding this list of states.

Ark. Dig. Stat. (1937) § 149. Realty may be sold to pay debts if there is not sufficient personalty.

Cal. Prob. Code Ann. (Deering, 1944) §§ 750 to 754. See discussion preceding this list of states.

Conn. Gen. Stat. (1930) § 4878. If the personal estate is insufficient for the payment of pecuniary legacies, they are a charge on the real estate not specifically devised. Specific legacies are not taken for debts and charges when there is other estate, real or personal, sufficient and available therefor and not specifically devised or bequeathed; but real estate may be sold in lieu thereof when necessary.

Del. Rev. Code (1935) § 3877. Realty may be sold to pay debts if there is not sufficient personalty.

D. C. Code (1940) § 18-607. Real estate may be sold to pay debts and legacies on a showing of a deficiency of personal assets.

Fla. Stat. Ann. (1941) §§ 734.05, 734.06. Sets out the common-law order of abatement to pay debts and legacies; there is no priority as between real and personal property; a gift to the widow in lieu of dower abates only after other gifts of the same class; gifts for a valuable consideration abate with other gifts of the class only to the extent of the excess over the consideration.

Ga. Code Ann. (1936) §§ 113-821, 113-1509. Debts are paid out of the residuum; if insufficient, then general legacies, then specific legacies. For the payment of debts, real and personal estate are alike liable. The property charged in the will is used first to pay debts; then the residuum, or if there is no residuary clause, the undevise estate; then general legacies; then specific legacies.

Idaho Laws Ann. (1943) §§ 15-701, 15-731, 15-732, 15-1202 to 15-1204. See discussion preceding this list of states.

Ill. Ann. Stat. (Smith-Hurd, 1941 and Supp. 1945) c. 3, §§ 379, 447. When there is insufficient personal estate to pay expenses of administration, claims, or legacies expressly or impliedly charged on the real estate, then the real estate may be sold. When it is necessary to refund after distribution, specific legacies need not be refunded unless the residue is insufficient.

Ind. Stat. (Burns, 1933) § 6-1136. When the personal estate is insufficient to pay debts, the undevisee real estate is first chargeable with the debts in exoneration of the real estate which is devised.

Iowa Code (1939) § 11933. Realty may be sold to pay debts if there is not sufficient personalty.

Kan. Gen. Stat. (Supp. 1943) § 59-1405. Property is resorted to for the payment of debts in the following order: (1) personalty not disposed of by will; (2) realty not disposed of by will; (3) residuary personalty; (4) residuary realty; (5) property not specifically devised or bequeathed; (6) property specifically devised or bequeathed.

Ky. Rev. Stat. (1944) § 395.200. Personalty specifically bequeathed and personalty exempted by the testator is not sold unless necessary to pay debts.

Me. Rev. Stat. (1944) c. 155, § 13. Similar to Indiana.

Md. Code (1939) art. 93, §§ 292, 346. The court may order the sale of the whole estate contained in the inventory when necessary to pay debts and claims. Real estate not specifically devised is chargeable to pay pecuniary legacies when there is not sufficient personal estate.

Mass. Ann. Laws (1932) c. 202, §§ 1, 4. Realty may be sold when personalty is insufficient to pay debts, legacies and charges of administration. Undevisee realty is first chargeable in exoneration of devised realty.

Mich. Stat. Ann. (1943) §§ 27.3178(102), 27.3178(103), 27.3178(462). If the provisions of the will for payment of debts are insufficient, then the real or personal estate not disposed of by the will is taken. Legacies and devises are paid in the following order: (1) realty specifically devised; (2) personalty specifically bequeathed;

(3) personalty passing by general or demonstrative bequests; (4) residuary realty; (5) residuary personalty. Real estate may be sold when there is not sufficient personalty to pay debts and expenses of administration, or when it is for the best interest of the estate.

Minn. Stat. (1941) §§ 525.63, 525.641. Realty may be sold when there is not sufficient personalty to pay debts and expenses of administration, or when it is for the best interest of the estate. When real estate is sold to pay debts, bequests, or other items, it is sold in the following order: (1) realty devised charged with the payment of such items; (2) realty not specifically devised; (3) realty specifically devised but not so charged.

Miss. Code (1942) §§ 586, 588. Realty may be sold to pay debts if there is not sufficient personalty. Realty may be sold in preference to personalty where it is for the best interest of the distributees or legatees.

Mo. Rev. Stat. Ann. (1942) §§ 112, 141, 246. Specific legacies shall not be sold unless necessary for the payment of debts. Realty may be sold when personalty is insufficient to pay debts and legacies. When it is necessary to refund after distribution, specific legacies need not be refunded unless the residue is insufficient.

Mont. Rev. Code (1935) §§ 7052 to 7056, 10195, 10234, 10235. See discussion preceding this list of states.

Neb. Rev. Stat. (1943) §§ 30-232, 30-233, 30-405, 30-1101. Personalty is first chargeable for debts, and realty may be sold if there is not sufficient personalty. If the property designated by will is insufficient, undevised property shall be taken, and specific devises and legacies are exempt if necessary to effectuate testator's intent and there are sufficient other assets.

Nev. Comp. Laws (Supp. 1941) §§ 9882.135 to 9882.139. See discussion preceding this list of states.

N. H. Rev. Laws (1942) c. 353, § 17; c. 360, §§ 17, 18. Realty may be sold when personalty is insufficient to pay debts and legacies. The real and personal estate not specifically devised and bequeathed is first liable for debts and legacies. If this is insufficient, then property devised and bequeathed may be taken.

N. J. Rev. Stat. (1937) § 3:25-23. Realty may be sold to pay debts if there is not sufficient personalty.

N. M. Stat. (1941) § 33-714. Real estate may be sold when the personal estate is insufficient to pay debts and legacies charged thereon.

N. C. Gen. Stat. (1943) §§ 28-81, 28-94, 28-95. Realty may be sold to pay debts if there is not sufficient personalty. Undevised realty is chargeable in exoneration of devised realty. When specifically devised land is sold, the devisee is entitled to contribution from the other devisees.

N. D. Rev. Code (1943) §§ 30-1825 to 30-1828, 56-0207, 56-0602 to 56-0604. See discussion preceding this list of states.

Ohio Gen. Code (Page, 1937 and Supp. 1944) §§ 10504-74, 10504-76, 10510-2. Realty may be sold to pay debts if there is not sufficient personalty. After the personal estate is exhausted, undevised real estate shall be taken before devised real estate. Specific devises and legacies are taken last.

Okla. Stat. (1941) t. 58, §§ 381, 463, 471; t. 84, §§ 3 to 6. See discussion preceding this list of states.

Ore. Comp. Laws (1940) §§ 19-804, 19-805, 19-818, 19-1101. Personal property specially bequeathed is exempt from sale as long as any property not specially devised or bequeathed remains unsold. When the personalty has been exhausted, realty may be sold, but the court may order it sold without regard to the personalty when it is for the best interests of the estate. Real estate specially devised is exempt in the same manner as personal property specially bequeathed. Realty may be sold to pay debts, funeral charges and expenses of administration, when there is not sufficient personalty exclusive of special bequests of personalty or legacies. Specific devises and legacies are exempt if necessary to effectuate testator's intent and there are sufficient other assets.

Pa. Stat. Ann. (Purdon, 1930) t. 20, §§ 551, 632. Realty may be sold when the personalty and rents of realty are insufficient to pay debts and expenses of administration. If there is not sufficient to pay all pecuniary legacies, an abatement shall be made in proportion to the legacies so given.

R. I. Gen. Laws (1938) c. 570, §§ 1, 2; c. 579, § 2. Personalty is first subject for debts. Undevised realty is chargeable in exoneration of devised realty.

S. C. Code (1942) § 9001. Realty may be sold to pay debts if there is not sufficient personalty.

S. D. Code (1939) §§ 35.1501 (amended Laws 1943, c. 134), 35.1516, 35.1528, 56.0402 to 56.0406. See discussion preceding this list of states.

Tenn. Code (Michie, 1938) § 8213. Realty may be sold to pay debts if there is not sufficient personalty.

Vt. Pub. Laws (1933) §§ 2917 to 2919. The personal estate is first chargeable. If the property designated in the will is insufficient, then real and personal estate not disposed of by will is taken. Specific devises and legacies are exempt if necessary to effectuate testator's intent and there are sufficient other assets.

Va. Code (1942) §§ 5382, 5395. Goods and chattels may be sold as necessary to pay debts and legacies, having regard to the privilege of specific legacies. All intestate realty, or testate realty not charged with or devised subject to the debts, or which remains after satisfying the debts with which it is charged, is liable for debts, in the order in which personal estate is directed to be applied.

Wash. Rev. Stat. (1932) §§ 1505 to 1507. If the estate appropriated by the will is insufficient to pay debts, the intestate estate shall be taken. Specific devises and legacies are exempt if necessary to effectuate testator's intent and there are sufficient other assets. Realty may be sold when a legacy is effectual to charge it, and the personalty is insufficient to pay such legacy.

W. Va. Code (1943) §§ 4139, 4225. Similar to Virginia.

Wis. Stat. (1943) §§ 313.26 to 313.28, 316.01. If provisions of will are insufficient for payment of debts, then real and personal estate not disposed of by will are taken. Then real and personal estate given by will, but specific devises and legacies are exempted if there is other sufficient estate and it shall appear necessary to effect the intention of the testator. Real estate may be sold when there is not sufficient personalty to pay debts and expenses of administration, or when it is for the best interest of the estate. Realty may be sold when a legacy is a charge thereon.

Wyo. Rev. Stat. (1931) §§ 88-3201, 88-3236, 88-3237. There is no priority between real and personal estate. If provisions of will

are insufficient for payment of debts, then realty and personalty not disposed of by will shall be taken, then real and personal estate given by will, but specific devises and legacies shall be exempt if necessary to effectuate testator's intent and there is other sufficient estate.

II. SPECIAL RULES IN CASE OF PRETERMITTED HEIR

In three states—Connecticut, Georgia, and Indiana—the birth of a child entirely revokes a prior will, hence there is no such thing in those states as a pretermitted heir. In a few other states the birth of issue sometimes works a revocation, but in other circumstances the child takes an intestate share; these states have therefore been included in this study. In Kansas, Wyoming, and the District of Columbia no rules have been found for pretermitted heirs.

In the following list of states divergences are noted between the rules of abatement to make up the share of a pretermitted heir and the rules of abatement in other cases (which will here be called "ordinary abatement"). In comparing these two sets of rules it must be borne in mind that many states have little or no statutory scheme for ordinary abatement. Presumably the common law rule applies in these states—viz., intestate property is taken first, then residuary legacies, then general legacies, and lastly specific legacies—and the remarks below are based on that assumption. Rules as to the relative priority of real and personal property are not considered in this study, since the intestate share of the pretermitted heir generally—if not always—includes both realty and personalty.

1. *A single rule to cover both types of abatement.*

Fla. Stat. Ann. (1941) § 731.11. "The share of the estate which is assigned to such pretermitted child shall be raised in accordance with the order of appropriation of assets set forth in this law."

§ 734.05. "The property of the estate shall be used for such purposes and to raise the shares of pretermitted spouse and children, in the following order. . . ."

Iowa Code (1939) § 11858. Share of pretermitted heir is "taken ratably from the interests of heirs, devisees, and legatees."

§ 11859. "All claims which it becomes necessary to satisfy, and all amounts necessary to be paid from the estate of a testator in dis-

regard of or in opposition to the provisions of a will, shall be taken ratably from the interests of heirs, devisees, and legatees."

Md. Code (1939) art. 93, § 338 states that pretermitted heir takes an intestate share, but no rules are given for raising the share; therefore the rules for ordinary abatement would seem to apply.

N.H. Rev. Stat. (1942) c. 350, § 11. "If the property not devised nor bequeathed shall be insufficient to satisfy the just share of such child . . . the same shall be made up in just proportion from the property devised or bequeathed to others."

C. 360, § 17. "The estate, real and personal, not specifically devised or bequeathed, shall be first liable to the payment of the legal charges against the estate and legacies given by the will, and to be applied to make up the share of any child born after the decease of the testator, or of any child or issue of any child omitted or not provided for in the will."

C. 360, § 18. "If the same is not sufficient, the property devised and bequeathed shall be liable therefor . . . in just proportion. . . ."

Pa. Stat. Ann. (Purdon, 1930) t. 20, § 273. Same as Maryland.

2. *Separate statutes to cover each of the two situations, but rules are the same.*

Neb. Rev. Stat. (1943) § 30-227. Share of pretermitted heir is made up first of estate not disposed of by will; then from all devises and legacies ratably, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated; in such case the specific legacy or other provision may be exempted. By §§ 30-231 and 30-232, in ordinary abatement, the estate not disposed of by will is taken first, then estate given by will, but specific devises and legacies are exempt if it appears to the court necessary to carry into effect the intention of the testator and there is sufficient other estate.

Vt. Pub. Laws (1933) §§ 2978, 2918, 2919. Like Nebraska statutes described above.

Wis. Stat. (1943) §§ 238.12, 313.27, 313.28. Like Nebraska statutes described above.

3. *Separate statutes to cover each of the two situations, with rules differing.*

Ala. Code (1940) t. 61, § 11. Rules for pretermitted heirs follow ordinary rules, with these exceptions:

- a. As to the intestate property, if widow or other children share in such property the share which the pretermitted child takes with such widow and other heirs must be applied to his portion.
- b. As to residuary legacies, those going to widow or any other children do not abate.
- c. Specific legacies are not mentioned.

Ariz. Code (1939) §§ 41-106, 41-107. Share for pretermitted heir is taken proportionately from all devises and legacies; differs from ordinary abatement in that no provision is made for intestate property or for specific legacies.

Ark. Dig. Stat. (1937) §§ 14524, 14525. Share for pretermitted heir is taken proportionately from all devises and legacies; differs from ordinary abatement in that no provision is made for intestate property or for residuary or specific legacies.

Cal. Prob. Code Ann. (Deering, 1944) § 91. Share of pretermitted heir is made up first of estate not disposed of by will; then from all devises and legacies ratably, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated; differs from ordinary abatement in that residuary legacies are not mentioned.

Colo. Stat. (1935) c. 176, § 41. Like Arkansas, described above.

Del. Rev. Code (1935) § 3717. Share of pretermitted heir is taken first from intestate property, then proportionately from legacies and devises; differs from ordinary abatement in that residuary and specific legacies are not mentioned.

Idaho Laws Ann. (1943) § 14-321. Same as California, described above.

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 199. Share of pretermitted heir is taken proportionately from all devises and legacies; differs from ordinary abatement in that intestate property and specific legacies are not mentioned.

Ky. Rev. Stat. (1944) § 394.460. Share of pretermitted heir is taken first from intestate property, then ratably from devises; differs

from ordinary abatement in that specific legacies are not mentioned. Neither statute mentions residuary legacies.

Me. Rev. Stat. (1944) c. 155, § 8. Share of pretermitted heir is taken proportionately from all devises, unless by a specific devise or some other provision a different apportionment is necessary to give effect to the intention of the testator; differs from ordinary abatement in that intestate property and residuary legacies are not mentioned.

Mass. Ann. Laws (1932) c. 191, § 20. Same as Maine, described above.

Mich. Stat. Ann. (1943) § 27.3178(84). Like California, described above.

Minn. Stat. (1941) § 525.202. Like California, described above.

Miss. Code (1942) §§ 658, 659. Like Arkansas, described above.

Mo. Rev. Stat. Ann. (1942) § 526. Share of pretermitted heir is taken proportionately from all heirs, devisees and legatees; differs from ordinary abatement in that specific legacies are not mentioned. Neither statute mentions residuary legacies or intestate property.

Mont. Rev. Code (1935) § 7010. Same as California, described above.

Nev. Comp. Laws (1929) § 9920. Same as California, described above.

N. J. Rev. Stat. (1937) §§ 3:2-16, 3:3-11. Same as Arkansas, described above.

N. M. Stat. (1941) §§ 31-117, 32-107. Share of pretermitted heir is taken proportionately from all heirs, devisees and legatees; differs from ordinary abatement in that intestate property, residuary and specific legacies are not mentioned.

N. Y. Dec. Est. Law, § 26. Like Arkansas, described above.

N. C. Gen. Stat. (1943) §§ 28-153 to 28-155. Share of pretermitted heir in realty is taken first from undeviseed realty, then proportionately from the devisees; same rule for share in personalty; any excess of intestate property of either type may be used to make up the share of the other type; differs from ordinary abatement in that specific legacies are not mentioned. Neither statute mentions residuary legacies.

N. D. Rev. Code (1943) § 56-0418. Same as California, described above.

Ohio Gen. Code (Page, 1937) § 10504-49. Share of pretermitted heir is taken proportionately from devises and legacies, "or in such other manner as may be found necessary to give effect to the intention of the testator as shown by the will"; differs from ordinary abatement in that specific legacies are not mentioned, unless the quoted clause refers to such legacies.

Okla. Stat. (1941) t. 84, § 133. Same as California, described above.

Ore. Comp. Laws (1940) § 18-501. Like Missouri, described above.

R. I. Gen. Laws (1938) c. 566, § 23. Like Maine, described above.

S. C. Code (1942) §§ 8924, 8925. Pretermitted heirs take an equal share of all realty and personalty given to other children under the will, who shall contribute to make up such share proportionately. Differs from ordinary abatement in that the other children are the only ones required to contribute, and specific and residuary legacies are not mentioned.

S. D. Code (1939) § 56.0231. Same as California, described above.

Tenn. Code (Michie, 1938) § 8132. Like New Mexico, described above.

Tex. Civ. Stat. Ann. (Vernon, 1941) art. 8291, 8292. Like Arkansas, described above. (Note that if the widow is the principal beneficiary, and the mother of all the children, and the will excludes the children entirely, a pretermitted heir has no share in the estate.)

Utah Code (1943) § 101-1-33. Like California, described above.

Va. Code (1942) §§ 5242, 5243. Share of pretermitted heir is taken ratably from devises and legacies; differs from ordinary abatement in that specific legacies are not mentioned. Neither statute mentions residuary legacies.

Wash. Rev. Stat. (1932) § 1402. Share of pretermitted heir is taken from other heirs, devisees and legatees proportionately; differs from ordinary abatement in that intestate property and specific legacies are not mentioned. Neither statute mentions residuary legacies.

W. Va. Code (1943) §§ 4059, 4060. Same as Virginia, described above.

As to remedies of the pretermitted child, see annotation in 123 A.L.R. 1073. Generally as to who must contribute to the child's intestate share, see Mathews, "Pretermitted Heirs: An Analysis of Statutes," 29 Col. L. Rev. 748 at 774 and 779 (1929) ; 1 Page, Wills (3d ed., 1941) § 532.

§ 193. DISCHARGE

Most of the twenty states having statutes on discharge of the personal representative are indefinite as to the effect of the discharge. Nine states provide merely that the representative shall be discharged from all liability to be incurred thereafter, which presumably does not affect his liability for past acts. Ariz. Code (1939) § 38-1517; Cal. Prob. Code Ann. (Deering, 1944) § 1066; Idaho Laws Ann. § 15-1331; Mont. Rev. Code (1935) § 10332; Nev. Comp. Laws (Supp. 1941) § 9882.274; Okla. Stat. (1941) t. 58, § 691; S. D. Code (1939) § 35.1726; Utah Code (1943) § 102-12-19; Wyo. Rev. Stat. (1931) § 88-3604.

Other states provide that the representative shall be discharged and his sureties released. It may be questioned whether this language refers only to future liability, or whether it bars a suit against the representative or surety for past acts. Kan. Gen. Stat. (Supp. 1943) § 59-1718; Mass. Ann. Laws (1932) c. 206, § 22 (the statute makes an exception when the representative's account is impeached for fraud or manifest error); Mich. Stat. Ann. (1943) § 27.3178 (307); Minn. Stat. (1941) § 525.504.

In Alabama and Georgia it is provided that the representative shall be released from all liability; Georgia has a saving clause for minors, and provides further that a discharge obtained by fraud is void. Ala. Code (1940) t. 61, § 362; Ga. Code Ann. (1936) §§ 113-2302 and 113-2303. It has been held in Georgia that the discharge bars an action for devastavit unless there is a showing of fraud in obtaining the discharge. *Wessel-Duval Co. v. Ramsey*, 170 Ga. 675, 153 S. E. 744 (1930). It has also been held that the discharge bars an action by the assignee of a legatee to obtain his share. *First National Bank & Trust Co. v. Hirschfeld*, 178 Ga. 581, 173 S. E. 663 (1933).

Some of the states employ language similar to that used in the Model Probate Code, providing that the discharge shall release the

representative from his duties. In this group are Fla. Stat. Ann. (1941) § 734.23 (it is further provided that the discharge shall bar any suit against the representative and sureties unless brought within one year); Iowa Code (1939) § 12052; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 911; Tex. Civ. Stat. Ann. (Vernon, 1941) art. 3642, 3643. In Wisconsin the discharge is presumptive evidence of the facts therein adjudicated. Wis. Stat. (1943) § 318.06.

Although most of the statutes are indefinite as to the effect of the discharge, it may be pointed out that the final accounting will usually determine any liabilities up to that time, so that there is relatively little to be adjudicated on the discharge. To that effect see *Ellis v. Stevens* (D. C. Mass., 1941) 37 F. Supp. 488. As to conclusiveness of orders allowing accounts, see appendix note on accounting (§§ 172-181).

§ 195. DETERMINATION OF DISTRIBUTEES

A wide variety of statutory provisions might properly be included under the general designation "determination of distributees." Thus, the statute found in a number of states requiring a specific designation of heirs and devisees in every final decree of distribution is, in a sense, a statute on this subject. A statute which provides a procedure for the quieting of land titles may likewise afford a means of determining distributees judicially. Neither of these types of legislation, however, is within the scope of this note. What is referred to here is a type of statute, found in twenty-five states, which provides an optional procedure for the determination of distributees, or of some classes of distributees, of the estate of a decedent. Some of these statutes permit a determination only if no administration is had. Some provide a proceeding independent of the proceedings for administration, while others permit the proceeding as a part of administration. Some apply only to intestate estates; others include distributees under a will. A number of them apply to real property only. Very commonly the legislation is referred to in the codes as concerned with "the determination of heirship."

Without doubt, the purpose of these statutes differs from state to state. Some, such as the West Virginia statute, are designed primarily to provide a means of showing on the real estate record the devolution

of the title to heirs. While a will may become a part of the public record and may become a link in the chain of paper title, the same is not true of a devolution of title to heirs unless there is a decree of distribution which makes specific reference to the interests acquired by them. In states where the decree of distribution is concerned only with personalty, a determination of heirship would be needed to complete the record title. Even if there is a will, however, it may merely devise land to "the heirs of A" without specifying who those heirs are. In California, a statute provides for a determination of heirship in precisely that situation. It is difficult to perceive, however, why that could not be determined in the decree of distribution in all cases and why separate legislation is required.

But even though the statute providing for the decree of final distribution requires that it be specific both as to real and as to personal property, an independent proceeding for the determination of distributees might be necessary in two situations: first, where the time has elapsed within which a petition for the administration of the estate or for the probate of the will may be filed and no such petition has been filed; and, second, where, by mistake or otherwise, a portion of the estate of the decedent has not been included in the decree of distribution and the administration of the estate is closed. The Minnesota statute applies only to these two situations. It would seem, however, that even the second of these two situations need not be the subject of a special statute on determination of distributees, since legislation could well provide for the reopening of the original administration for the purpose of distributing the estate overlooked. The Model Probate Code provides for such reopening in § 194.

Many statutes for the determination of distributees, particularly if they can be used only when no administration is had, could well be described as a means of dispensing with administration. Indeed, one of the Colorado statutes hereinafter referred to indicates that it was enacted expressly for that purpose.

It is interesting to note that in these statutes providing for the determination of distributees when no administration is had, a designated waiting period after the death of the decedent is usually required; and this period coincides pretty generally with the period after which claims are barred if no administration is had. See appendix note for § 135 as to

these statutes. The reason for this correlation of time periods is to obviate any conflict between creditors' rights and those of the distributees. If distribution is permitted before the period of limitations for claims, the creditors will have to proceed against the various distributees, with resulting inconvenience and the possibility of finding them uncollectible. The following table indicates the length of the waiting period, together with the statute of limitations for creditors' claims in unadministered estates, in the various states where both limitations are present.

	WAITING PERIOD FOR DETERMINATION OF HEIRSHIP	TIME LIMIT FOR PRESENTATION OF CLAIMS
Colorado	One year from death	Two years from death
Idaho	Two years from death	Same proceeding bars claims
Kansas	One year from death	One year from death
Minnesota	Five years from death	Five years from death
Nebraska	Two years from death	Two years from death
New Mexico	Six years from death	Six years from death
North Dakota	Six months from death	Non-existence of debts is a prerequisite for determination of distributees; the proceeding also bars any unknown creditors.
Wisconsin	Three years from death	Three years from death
Wyoming	Two years from death	Four years from death

In Kansas, where the statute is limited to intestate estates, the limitation is doubtless because the determination of heirship can be instituted only after one year after the decedent's death, and a will cannot be probated after this period. In other words, to permit a determination of devisees and legatees after the period for probate has passed would in effect be an exception to the limitation period for probate. For the same reason the Model Probate Code makes special provision only for the determination of heirs, but not of devisees and legatees.

The statutes of the twenty-five states on the subject of determination of distributees are listed herewith, together with a brief summary of the principal features of each. Emphasis is placed upon the type of

estate covered (testate or intestate, real or personal), the relation to administration proceedings, when the petition is to be filed, and the effect of the determination of distributees.

Ariz. Code (1939) §§ 38-1518 to 38-1521 apply to both testate and intestate estates, and the proceeding is a part of the administration. The petition may be filed any time after one year from the issuing of letters. The decree is final and conclusive in the distribution of the estate and of the title to the property of the estate.

Cal. Prob. Code Ann. (Deering, 1944) §§ 1080 to 1082 apply to a proceeding during administration, to determine distributees when the estate is not in a condition to be closed. The petition may be filed when the time to present claims has expired. When the decree becomes final it is conclusive on the matters determined during the remainder of the administration and on any subsequent proceeding for distribution. Sections 1190 to 1192 apply to a proceeding to establish the identity of persons who take other than by the laws of succession and who are not identified beyond such words as "heirs" or "children." It applies to both realty and personalty in a testate estate. It is an independent proceeding, not connected with administration. The decree is prima facie evidence of the facts determined, and is conclusive in favor of any person acting thereon in good faith without notice of any conflicting interest.

Colo. Stat. (1935) c. 176, §§ 13 to 15 apply to a determination during administration; the petition may be filed any time before the order for notice of final settlement. It covers both realty and personalty. The statute is not clear as to whether it applies to testate or intestate estates, or to both. The decree is fully binding on all heirs and their grantees, and a distribution of personalty thereunder discharges the personal representative; but any claimant or his grantee by a deed recorded prior to the entry of the decree, who is not personally served with notice, may move to reopen the decree in so far as it applies to lands within two years after the entry thereof. Sections 18 to 26 apply to intestate estates of not over \$2000 where no administration is had within one year from the last publication of notice to demand administration. The decree is conclusive and binding on all heirs and grantees, with a similar privilege of reopening the decree within one year. Sections 28 to 34 apply only to intestate lands, and the

proceeding may be brought either after one year from death if no administration has been had, or after final settlement if administration has been had but the descent was not determined. The decree has the same effect as the decree described above in a proceeding during administration.

Fla. Stat. Ann (1941) § 734.25 covers both testate and intestate estates, and may be brought during or after administration, or in the absence of administration. Any personal representative who makes distribution or takes any other action pursuant to the order is fully protected.

Idaho Laws Ann. (1943) §§ 15-1401 to 15-1404 apply only when no administration has been had for two years after death. It covers both realty and personalty, but is limited to intestate estates. The decree is binding and conclusive on all persons, including creditors and heirs, and all claims are forever barred unless the creditor appears at the hearing and demands appointment of an administrator. Sections 15-1701 to 15-1708 apply in administered estates, and estates heretofore administered and closed leaving realty the title to which has not been determined by a testament duly allowed and recorded, and in estates where no administration has been had. The proceeding applies to realty only, both testate and intestate. The petition may be filed after one year after the issuing of letters, or within one year of death in other cases. The decree is final and conclusive in the administration of the estate and the title to the property.

Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 209 to 211 cover proceedings had during administration or in the absence of administration. The petition may be filed any time during the administration or prior to the probate of a will. The decree is prima facie evidence of heirship, but any other method of proving heirship may be had by any party. This proceeding may be had on affidavit, and is apparently not an adversary proceeding.

Kan. Gen. Stat. (Supp. 1943) §§ 59-2250 to 59-2252 apply to intestate estates only. The proceeding may be brought after one year from death if no will has been admitted to probate nor administration had, or administration has been had without a determination of descent. A person served only by publication may have the decree reopened within one year, but a bona fide purchaser is protected after six months.

Mich. Stat. Ann (1943) §§ 27.3178(145) to 27.3178(149) apply only to realty, and the purpose of the proceeding is to determine who are the heirs under the laws of the state, or who are entitled to take under a conveyance or grant to the heirs of a deceased person. It may be an independent action, not connected with administration. The decree may be recorded in the deed records, and is conclusive evidence of the identity of the heirs if the determination is made in the course of administration or if fifteen years have elapsed since death; in other cases it is *prima facie* only.

Minn. Stat. (1941) §§ 525.31 to 525. 312 apply to both testate and intestate estates, but only to realty. The proceeding may be brought after five years from death if no will has been admitted to probate nor administration had, or when realty has not been included in a final decree. The statute is silent as to the effect of the determination.

Miss. Code (1942) §§ 1270 to 1272 apply to both realty and personality, but only to intestate estates. The proceeding is apparently independent of administration. The decree may be recorded in the deed records, and is evidence in all courts of law and equity in the state, and may not be assailed collaterally except for fraud; it is binding and conclusive on all persons cited to appear from the date of its rendition, and on all persons after two years, saving to minors and persons of unsound mind the right to reopen the decree within one year of removal of their disabilities.

Mont. Rev. Code (1935) §§ 10324 to 10326 cover both testate and intestate estates, and both realty and personality. The proceeding takes place during administration, and may be had any time after the issuing of letters. The decree is final and conclusive in the administration and of the title to the property.

Neb. Rev. Stat. (1943) §§ 30-1701 to 30-1704 apply only to intestate realty. The proceeding may be had after two years from death if no administrator has been appointed, or if administration has been had and has been closed or dormant for more than two years and no decree of heirship has been entered. The decree is binding and conclusive on all persons, including creditors and heirs, and all claims are forever barred. The creditors may appear at the hearing. Sections 30-1705 to 30-1708 apply to a proceeding to secure probate of a

will without administration. It applies to realty only. The petition may be filed after two years from death when no application has been made to admit the will; but these sections do not apply when by the terms of the will property is directed to be sold. The decree admits the will to probate, but no executor is appointed. The decree is binding and conclusive on all persons, including creditors and heirs. The creditors may appear at the hearing.

N. J. Rev. Stat. (1937) §§ 3:4-1 to 3:4-3 apply only to intestate realty. Apparently the proceeding is independent of administration. The decree may be recorded in the deed records, and is presumptive evidence of the matters and facts therein contained. This proceeding may be had on affidavit, and apparently is not an adversary proceeding.

N. M. Stat. (1941) § 33-1206 provides for a proceeding during administration on the petition of the personal representative or of anyone claiming to be an heir or devisee and not named as such in the petition for appointment of the personal representative. It applies to both testate and intestate estates, and to both realty and personalty. The petition may be filed any time during administration. The decree is final and conclusive in the distribution of the estate and in regard to the title to all property, subject to the rights of creditors of the estate. Sections 33-1213 to 33-1218 apply when no administration has been had for six years after death. The proceeding applies to realty only, and probably to intestate estates only, since there is no provision for probating a will. The statute is silent as to the effect of the determination.

N. Y. Surr. Ct. Act, §§ 311 to 313 apply only to intestate realty. The petition is filed in the surrogate's court which has acquired jurisdiction of the estate or in the surrogate's court in the county where the land is. Apparently it is independent of administration proceedings. A copy of the decree may be recorded as deeds are recorded, and from the time of recording the decree is conclusive evidence of the facts established against all parties to the proceeding.

N. D. Rev. Code (1943) §§ 30-2201 to 30-2213 apply only to intestate realty, when administration has not been had. The petition may be filed after six months from death, if the expenses of the last

illness and funeral have been paid and there are no debts. The decree may be recorded in the deed records, and is final and conclusive against all creditors, heirs and others and their successors or assigns, and on all parties named in the proceeding, including those proceeded against as unknown persons.

Ohio Gen. Code (Page, 1937) §§ 10509-95 to 10509-101 apply to intestate estates, and testate estates when property passes under the will to beneficiaries not named in the will. The proceeding is part of the administration. The decree is *prima facie* evidence; any fiduciary who makes a final distribution or takes other appropriate action respecting a trust upon the determination is discharged from liability arising from the determined interest, and the title to any property purchased from the fiduciary is free from the determined interest.

Okla. Stat. (1941) t. 84, §§ 251 to 256 provide for a proceeding when the time limited for institution of administration has passed or there is no lawful ground for their institution. The decree is final and conclusive on all persons appearing or who were personally served; it is also final as to persons served by publication unless they file a petition to reopen the decree within twelve months. Sections 257 to 261 provide for a determination as part of a proceeding involving land. It applies to intestate estates, and to testate estates where there is a devise in such terms as "heirs" or "family." It may be brought after three years from death if there has been no decree determining heirship. The decree is conclusive as to the rights of devisees, heirs or grantees, subject to reopening as in civil actions.

Ore. Comp. Laws (1940) §§ 19-1301 (amended Laws 1945, c. 184) to 19-1306 apply to both testate and intestate estates. The proceeding is part of the administration, and may be brought after six months from the issuance of letters. The decree is final and conclusive, but any claimant served by publication who had no actual knowledge prior to the entry of the decree may petition to reopen the decree within three years.

Tex. Civ. Stat. Ann (Vernon, 1939) art. 3590 to 3597a apply to both realty and personalty. In case no administration has been had, the proceeding applies only to intestate estates, but the proceeding also applies when there has been a will probated or administration had and

property has been omitted from the will or administration, or no final disposition has been made in the administration. The decree may be recorded in the deed records, and is conclusive as between parties personally served, and as to nonresident defendants and bona fide purchasers; as to all other persons it is prima facie; but the judgment does not preclude a suit against the persons named therein based on the allegation that they have received more than their share.

Utah Code (1943) §§ 102-12-34 to 102-12-35 apply when letters have not been applied for after three months from death. The decree is conclusive on the parties and their successors in interest.

Vt. Pub. Laws (1933) §§ 2913 to 2916 apply to realty only, and probably to intestate estates only. The proceeding may be brought after seven years from death if the estate has not been administered and the interest of the heirs has not been conveyed or has been defectively conveyed. If the court determines that the heirs are not entitled to possession it decrees that the land is not a part of the estate, and may appoint an administrator to convey record title to the persons adjudged to be legally entitled thereto.

W. Va. Code (1943) § 4088 applies only to intestate realty. The proceeding is apparently independent of administration, and must be brought within twenty years after death. The decree may be recorded in the deed records, and is conclusive evidence against all parties to the proceeding from the time of recording. Any person under disability or proceeded against by publication and not appearing may have the matter reheard as in other cases.

Wis. Stat. (1943) § 237.09 provides a non-adversary proceeding to obtain a certificate of descent, and applies to realty only. It is independent of administration. The decree may be recorded in the deed records, and is prima facie evidence. Sections 315.02 to 315.06 apply to intestate realty; the proceeding may be had in an administered estate when there is no personal property which would be proper assets for payment of debts after six months from death, or in an unadministered estate after three years from death. The decree may be recorded in the deed records, and is presumptive evidence in all courts and places, and conclusive evidence against the persons to whom notice was given.

Wyo. Rev. Stat. (1931) §§ 88-3701 (amended Laws 1943, c. 105, § 10) to 88-3704 are for a determination during administration. It applies to both testate and intestate estates, and may be brought at any time after expiration of the time for filing claims. The decree is final and conclusive in the administration, and of the title to the property. Sections 88-4101 to 88-4103 (amended Laws 1945, c. 79) are for a determination where no administration has been had after two years from death. It applies to realty only. The statute is silent as to the effect of the decree.

APPENDIX B

Time Schedule

I. DECEDENTS' ESTATES

PROCEEDING OR STEP

TIME LIMIT

Notice of hearing if required, § 14(b).

Personal notice: at least 7 days before hearing.

Publication: must be started at least 30 days before hearing.

Notice of appointment of personal representative when administration is begun without notice, § 70.

As soon as letters are issued.

Probate of written will and administration, § 83.

Petition must be filed within 5 years after death of decedent.

Probate of nuncupative will, § 49.

Submitted for probate within 6 months after death of testator.

Probate of after-discovered will, § 75(c).

Submitted for probate before decree of final distribution.

Will contest, § 73:

- | | |
|---|--|
| (a) On ground of existence of another will. | Before decree of final distribution and within 5 years of death of decedent. |
|---|--|

(b) On other grounds:

- | | |
|------------------------------------|---|
| 1. When probate is with notice. | Before hearing on petition for probate. |
| 2. When probate is without notice. | Within 4 months after notice of appointment of personal representative. |

Election of surviving spouse:

- | | |
|--|---|
| (a) Notice of right of election, § 34. | Within one month after will is admitted to probate. |
| (b) Election, § 35. | Within one month after expiration of nonclaim period; but if at the expiration of such period litigation is pending which would affect the spouse's share, period is extended for one month after final determination of such litigation. |

Inventory:

- | | |
|--|---|
| (a) Inventory must be filed, § 120(a). | Within 2 months after appointment of personal representative, unless longer time is granted by court. |
| (b) Inventory of newly discovered assets, § 121. | Within 30 days after discovery, or in next accounting. |

APPENDIX B—Continued

Setting aside homestead, etc.

(a) Homestead, § 42.	Any time after return of inventory.
(b) Exempt property, § 43.	Any time after return of inventory.
(c) Family allowance, § 44.	Any time after filing of inventory, but temporary allowance may be made prior thereto in case of great need.

When order of no administration cannot be revoked on stated grounds, § 91. After one year.

Claims:

(a) Nonclaim period, § 135(a).	4 months after first publication of notice to creditors.
(b) When no administration is had, § 135(d).	5 years from death of decedent.
(c) Payment of claims, § 148.	After 4 months after first publication of notice to creditors and final adjudication of all claims; court may order earlier payment.

(d) Contingent claims:

(1) Retention of funds by personal representative for payment of contingent claims, § 140(b).	Not longer than 2 years after distribution of remainder of estate.
(2) Action by claimant against distributees, § 141.	Action must be commenced within 6 months after claim becomes absolute.

Sale, mortgage or lease of land, report of sale, § 166.	Within 10 days after sale.
Accounting, § 174.	Annually; also on petition for final settlement; also when ordered by court, and on resignation or revocation of letters.
Interest on legacies, § 188.	Beginning 9 months from filing of petition for appointment of personal representative.
Closing estate:	
(a) Time for closing estate, § 173.	9 months after filing of petition for appointment of personal representative unless extended by court.
(b) Final distribution, § 183.	After nonclaim period and after all claims which are payable have been paid.
Refund to person entitled to unclaimed assets paid to state treasurer, § 192(d).	Application must be made within 7 years after payment to state treasurer.
Vacation of judgments, § 19.	Within period allowed for appeal after final termination of administration.
Appeals, § 20(g).	Within time provided for appeals from district court to supreme court in equity cases.
Action on personal representative's bond, §§ 119, 193.	Within 2 years after discharge.

APPENDIX B—Continued

II. GUARDIANSHIP

Whenever notice of hearing is required, §§ 14(b), 207.

Personal service: at least 7 days before hearing.

Publication: must be started at least 30 days before hearing.

In case of notice on petition for guardianship, court may for good cause reduce number of days, but at least 3 days' notice must be given.

38 Temporary guardian's term of service, § 215.

Not to exceed 60 days.

Inventory must be filed, § 218.

Within 2 months after appointment of guardian, unless longer time is granted by court.

Claims:

(a) Nonclaim period, § 227(b).

None, except ordinary statute of limitations (as to living wards; see below for deceased wards).

(b) Payment, § 227(a).

On allowance by court or on approval by court in settlement of guardian's accounts.

Sale, mortgage or lease of land, report of sale, § 230 (c).	Within 10 days after sale.
Accounting, § 233 (a) and (c).	Annually within 30 days after anniversary date of appointment; also within 30 days after termination of appointment; also on petition for final settlement; also when ordered by court.
Questioning of account by ward, § 233 (b).	Within 2 years after discharge of guardian.
Administration of deceased ward's estate by guardian: (a) When guardian entitled to administer, § 235.	Unless petition for letters is filed within 30 days after ward's death.
(b) Nonclaim period, § 235.	60 days after first publication of notice to creditors.
Vacation of judgments, § 19.	Within period allowed for appeal after final termination of administration.
Appeals, § 20 (g).	Within time provided for appeals from district court to supreme court in equity cases.
Action against guardian and his sureties, § 236.	Within 2 years after discharge of guardian.

PART THREE
MONOGRAPHS ·
ON
PROBLEMS IN PROBATE LAW

The Organization of the Probate Court in America *

Lewis M. Simes and Paul E. Basye

THIS is a study of contemporary American legislation concerning probate courts, with particular reference to their jurisdiction over the probate of wills and the administration of estates of deceased persons.

By the term "probate courts" is meant all judicial tribunals which exercise such jurisdiction. As will subsequently appear, they are otherwise variously designated as surrogates' courts, orphans' courts, prerogative courts, courts of ordinary and county courts. In one state all the functions of probate and administration are exercised by courts of chancery. In other states, chancery has concurrent jurisdiction over many of these functions. Sometimes the register of probate exercises some of the functions of a probate court, while an orphans' or other court acts in other probate matters. Again, two separate courts may each exercise a part of the functions of a probate court. In one group of states, probate and administration is merely a separate function of the trial court of general jurisdiction or of its judge. But, regardless of its name, every tribunal which exercises jurisdiction over the probate of wills or the administration of decedents' estates, from its initiation to the time of final distribution, is within the scope of this study.

In view of the great influence of the English pattern in the formative period of American probate law, we shall begin with a brief survey of the English system of probating wills and administering the estates of deceased persons. This will be followed by a consideration of the types of American probate

* Originally printed as an article in 42 Mich. L. Rev. 965 and 43 Mich. L. Rev. 113 (1944).

court organizations, the subject matter of their jurisdiction, and the personnel of these courts.

The subject of appellate procedure, as such, is not within the scope of this discussion, but will be considered only as it tends to indicate the character of original jurisdiction.

I. SOME SIGNIFICANT ASPECTS OF THE ENGLISH LAW OF DECEDENTS' ESTATES

A. PROBATE AND ADMINISTRATION IN ENGLAND IN THE EIGHTEENTH CENTURY ¹

It is not the purpose of this brief discussion of certain aspects of the English law of decedents' estates to give a complete account of the entire course of its development. Rather its object is merely to present enough of that development to explain the principal source from which American probate law was drawn. While doubtless there were borrowings at an earlier period,² the English probate law of the eighteenth century is so typical of that which existed for a century before that a consideration of its significant aspects will furnish us with an adequate picture of the well from which much of our probate legislation was drawn. Moreover, since there were few im-

¹ In general on this period see the following: Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. Rev. 107 (1943); REPPY and TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION* (1928); REPORT BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832); LANGDELL, *BRIEF SURVEY OF EQUITY JURISDICTION* (2d ed. 1908) 125-191; 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1922) 625-630; MAITLAND, *EQUITY* (Rev. ed. 1936) 248-276; WILLIAMS, *EXECUTORS* (1st Am. ed. 1832); STORY, *EQUITY JURISPRUDENCE* (1st ed. 1836); CONSET, *THE PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS* (3d ed. 1708); TOLLER, *EXECUTORS AND ADMINISTRATORS* (2d Am. ed. 1824); BURN'S *ECCLESIASTICAL LAW* (9th ed. by Phillimore, 1842).

² See Atkinson, "The Development of the Massachusetts Probate System," 42 MICH. L. REV. 425 (1943).

portant changes in that law up to the legislation of 1857,³ it is assumed that sources which describe the English probate system of the early half of the nineteenth century are equally pertinent to our study.

Matters pertaining to the administration of decedents' estates were dealt with in three kinds of tribunals, namely, the ecclesiastical courts, the common-law courts and chancery. Our study of English probate law will discuss the functions of these courts in that order.

1. *Jurisdiction of the ecclesiastical courts*

The jurisdiction of the ecclesiastical courts has been classified under three general heads: ⁴ pecuniary causes, arising from "withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff"; matrimonial causes; and testamentary causes, including "the probate of wills, the granting of administrations, and the suing of legacies."⁵ In matters relative to wills and administration, the jurisdiction of the ecclesiastical courts was limited to the disposition of personal property. As to the probate of wills and the granting of letters testamentary and letters of administration, their jurisdiction was exclusive.

It would not be helpful in this connection to set forth in detail a description of the bewildering varieties of ecclesiastical courts ⁶ having jurisdiction, original or appellate, such as the diocesan courts, the prerogative courts, the court of arches, the court of peculiars and the court of delegates. Suffice it to say that the original jurisdiction as to decedents' estates was, in general, exercised by consistory courts of the dioceses and the

³ 20-21 Vict., c. 77 (1857).

⁴ 3 BLACKST. COMM. *88, *89.

⁵ Id. *98.

⁶ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (1922) 598.

prerogative courts of Canterbury and York.⁷ The judge of the consistory court was called the ordinary judge, or merely the ordinary.⁸ The deputy of the judge of an ecclesiastical court was sometimes called the surrogate.⁹

The ecclesiastical courts were not courts of record.¹⁰ Just precisely what is meant by a court of record is none too clear.¹¹ Probably at the present time its most important characteristic is its power to fine and imprison. But, as Professor Holdsworth says: "It is the infallibility of its formal record which is the earliest mark of a court of record."¹² Thus the decrees of an ecclesiastical court did not import the same infallibility as the judgment of the King's Bench. Moreover (and this may have had something to do with the conclusion that it was not a court of record) it did not proceed according to the common law. Rather, its procedures were evolved from the civil and canon law, as such strange terms as citation, libel or significavit might well indicate.¹³

When a person died testate, his executor could either have the will probated in common form (sometimes called noncontentious form) or in solemn form. If he chose to prove it in common form, the procedure was simple, indeed. No notice or process was issued to anyone. Strictly speaking, no actual evidence of the due execution of the will was required. The will was admitted to probate on the oath of the executor,

⁷ 3 BLACKST. COMM. *97.

⁸ 3 BURN'S ECCLESIASTICAL LAW (9th ed. by Phillimore, 1842) 39.

⁹ 3 BURN'S ECCLESIASTICAL LAW (9th ed. by Phillimore, 1842) 667; and see 3 STROUD'S JUDICIAL DICTIONARY (2d ed. 1903) 1996 quoting from *Termes de la Ley* as follows: Surrogate "is he who is appointed in the stead of another, most commonly of a Bishop or his Chancellor."

¹⁰ 1 BACON'S ABRIDGMENT (5th ed. 1786) 558; 3 BLACKST. COMM. *67.

¹¹ 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 157; 3 BLACKST. COMM. *24; Stonex, "Courts of Record and Courts Not of Record," 31 CENTRAL L. J. 86 (1890).

¹² 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 158.

¹³ In general as to procedure in an ecclesiastical court, see REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832) 14.

which ordinarily amounted to nothing more than hearsay and opinion. According to Conset,¹⁴ writing near the end of the seventeenth century, the oath was as follows:

"You shall swear, that you believe this to be the last will and testament of the deceased, and that you will pay all the debts and legacies of the deceased, so far as the goods will extend, and law shall bind you; and that you will cause all the said goods to be apprizd, and make a true and perfect inventory of the said goods, (at a day appointed by the judge, if none be then exhibited) and likewise a true and just accompt of the said goods, when you shall be thereto lawfully called. So help you God."

The will then at once being admitted to probate, letters testamentary were issued to the executor who proceeded to administer the personal estate of the testator.

At any time within thirty years the executor or some other interested party could have the will proved in solemn form. This was spoken of as the contentious procedure. Notice to interested parties was given by citation;¹⁵ the attesting witnesses were called and testified as to the due execution of the will. The order admitting the will to probate was binding on all parties who appeared in the proceeding or who were cited.

Proceedings to administer the goods of a person who had died intestate were similar in form. They might be either with or without notice to interested parties. But Conset tells us that "if there is no widow or relict of the deceased (to whom the administration of the goods of the intestate ought to belong of course) then the nearest of kindred, coming to obtain letters of administration, must first have a citation against all and singular next of kindred to the deceased."¹⁶ One method of

¹⁴ CONSET, PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS (3d ed. 1708) 12. The first edition was dated 1681.

¹⁵ See note 13, supra.

¹⁶ CONSET, PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS (3d ed. 1708) 14.

requiring notice, which might be employed either in the case of a testate or of an intestate estate, was for an interested party to file a paper known as a caveat. This required notice to be given to the caveator before any further steps could be taken in the case. Thus the caveat might lead to the proof of the will in solemn form. It should also be noted that the caveat could be filed before any other proceedings had been taken with respect to the estate of the deceased.

After the issuance of letters, there might be little or nothing more in the way of judicial proceedings in the ecclesiastical court. It is true, a statute of the reign of Henry VIII¹⁷ required the personal representative to render an inventory of the goods of the deceased. And the Statute of Distribution¹⁸ required the administrator to give a bond to render an inventory and to account. But it appears that this was not always done.¹⁹ Certainly there was no order of distribution such as is common in American probate courts today. The personal representative merely paid the debts and then distributed the residue to the legatees or next of kin.

It should be pointed out that, throughout its procedure, the ecclesiastical court conducted a case quite differently from a common-law court. Oral testimony was not heard at the trial but depositions were taken and were read by the judge previous to the hearing.²⁰ Orders of the court would ordinarily be enforced by excommunication only, or, if this be ineffective, chancery might be asked to issue an attachment so that the refractory party might be imprisoned until he obeyed the order of the court. Review of decisions of the ecclesiastical

¹⁷ 21 Henry 8, c. 5, p. 167 (1529).

¹⁸ 22-23 Car. 2, c. 10, p. 347 (1670).

¹⁹ TOLLER, *THE LAW OF EXECUTORS AND ADMINISTRATORS* (2d Am. ed. 1824) 249, 492; 2 WILLIAMS, *EXECUTORS* (1st Am. ed. 1832) 1263-1265.

²⁰ REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832) 19.

court was by appeal, not by writ of error, and the appellate court could re-examine questions of fact as well as of law and come to a decision *de novo*.²¹

One other feature of the procedure in the ecclesiastical courts with respect to decedents' estates should be noted. It appears that it was relatively easy to secure the revocation, in the ecclesiastical court of original jurisdiction, of an order admitting a will to probate or appointing an executor or administrator.²² And even though the will had been proved in solemn form, this did not prevent a revocation of probate on a later hearing.²³

2. *Jurisdiction of the common-law courts*

As has already been indicated, the ecclesiastical court had no jurisdiction over devises of land. That was ordinarily a matter for the common-law courts.²⁴ This does not mean that wills of land were probated in the common-law court, for they were not. But, with respect to the land devised by it, a will was operative without any probate whatever. Title passed to the devisee immediately on the death of the testator, just as title passes to the grantee in a deed immediately upon its delivery. If a will disposed of both personalty and realty, the action of the ecclesiastical court, in admitting it to probate or in refusing to do so, did not determine whether the will was a valid devise of real estate. And, if a will disposed of real estate only, the ecclesiastical court had no jurisdiction to admit it to probate.²⁵ When an heir or devisee wished to test the validity of a devise of land, he brought some action to try title, such as ejectment or trespass. Even a judgment in such

²¹ POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941) 67-70.

²² 1 WILLIAMS, *EXECUTORS* (1st Am. ed. 1832) 347, 359.

²³ 1 WILLIAMS, *EXECUTORS* (1st Am. ed. 1832) 359.

²⁴ 2 PAGE, *WILLS* (3d ed. 1941) § 563.

²⁵ *In the Goods of John Bootle*, L. R. 3 P. & D. 177 (1874).

an action did not prevent further actions of ejectment or trespass in which the validity of the will might be adjudicated anew.

Contract actions which survived the death of the decedent could be brought in a court of common law, whether on behalf of or against the decedent.²⁶ The personal representative could sue and be sued in his representative capacity. Unless chancery interfered, a creditor of the decedent might recover judgment against the executor or administrator in a court of law which was enforceable only against the goods of the estate. Thus, the judgment would be "*de bonis testatoris*."

In the case of a specific legacy,²⁷ such as a collection of silver plate or an oil painting, the executor must first "accept the legacy," that is perform some overt act indicating that the chattel was set aside for the legatee. Then title vested in the legatee and he could bring an appropriate action at law, such as replevin or trover, to assert his rights in it. If, however, the legacy was general²⁸—that is a gift of a sum of money—there was apparently a difference of opinion as to whether an action of assumpsit at law was proper, but it was eventually determined that this could not be brought. The remedy was by action in the ecclesiastical court. And, if a legatee chose to file a bill to have the estate administered in chancery, he could secure a determination of his rights in that tribunal, regardless of the character of his legacy.²⁹

Before concluding with the discussion of the function of the court of law something should be said about the use of the writ of prohibition. If a party to a proceeding in the ecclesiastical

²⁶ Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 118, 121 (1943); LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) 166, 167.

²⁷ 2 WILLIAMS, EXECUTORS (1st Am. ed. 1832) 843 ff.

²⁸ Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 119 (1943).

²⁹ LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) 154, 157.

court thought that court had exceeded its jurisdiction, he might obtain a writ of prohibition in the common-law court.³⁰ Since it was conceded (to use the language of an early case) that the ecclesiastical courts "had but a lame jurisdiction,"³¹ these writs must have been frequently issued. For example, the King's Bench had held that, after an inventory was exhibited, the ecclesiastical court could entertain no objections to it by a creditor.³²

3. *Jurisdiction of chancery*

While the writs of prohibition crippled the jurisdiction of the ecclesiastical courts, the common-law courts from which they issued had no machinery adapted to the administration of estates. The net result was that chancery, with its more flexible procedure, tended more and more to take over matters of administration. Though the will would be admitted to probate and the personal representative appointed by the ecclesiastical court, a creditor or distributee might file his bill to have the estate administered in chancery. This jurisdiction might be sought for the purpose of discovering assets; because a trust was involved, or, though no actual trust was involved, because the estate was regarded as a kind of trust fund and the personal representative as a kind of trustee.³³ But, for whatever reason jurisdiction was assumed, chancery ordinarily continued with the administration until it was complete. Notices to creditors were published; actions by creditors in common-law courts were enjoined; assets were brought in and distributed to creditors and legatees or next of kin.

³⁰ Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. Rev. 107 at 117 (1943).

³¹ Matthews v. Newby, 1 Vern. 133 at 134 (1682).

³² See 2 WILLIAMS, EXECUTORS (1st Am. ed. 1832) 644, 645 and cases cited therein.

³³ 1 STORY, EQUITY JURISPRUDENCE (1st ed. 1836) §§ 530 et seq.; LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) Arts. VI and VII; MAITLAND, EQUITY (Rev. ed. 1936) 248-257.

And not only did chancery administer personalty of the decedent, but it might also take charge of some or all of his real estate. Thus, if a testator had devised his lands to his executor in trust for the payment of debts, or for the payment of debts and legacies, the court of equity would take charge of the land and administer it as directed by the testator.³⁴

Chancery never assumed jurisdiction to probate a will or to appoint an executor or administrator. But, as to all subsequent steps in the process of administration, it might take jurisdiction if an interested party filed a bill asking for it. The concurrent jurisdiction of the ecclesiastical courts continued, it is true; but the chancery procedure was regarded as so much more satisfactory that administration in equity became a common practice.

Moreover, the chancery court might find itself confronted with a question of the validity of a devise of land. The issue could arise merely incidentally in connection with some related matter. Or the parties might come into chancery solely for the purpose of establishing the will and having the heir enjoined from interfering with the enjoyment of the devisee. Story thus describes the procedure in these two situations:³⁵

"If the will is of real estate, and its validity is contested in the cause, the Court will, in like manner, direct its validity to be ascertained, either by directing an issue to be tried, or an action of ejectment to be brought at law; and will govern its own judgment by the final result. If the will is established in either case, a perpetual injunction may be decreed.

"But, it is often the primary, though not the sole, object of a suit in Equity, brought by devisees and others in interest, to establish the validity of a will of real estate. . . . In such cases the jurisdiction, exercised by Courts of Equity, is somewhat analogous to that exercised in cases of Bills of Peace. . . . In every case of this sort, the Court will, unless the heir waives

³⁴ Atkinson, "Brief History of English Testamentary Jurisdiction," 8 Mo. L. REV. 107 at 119 (1943).

³⁵ 2 STORY, EQUITY JURISPRUDENCE (1st ed. 1836) 671.

it, direct an issue of *devisavit vel non*, (as it is technically, though, according to Mr. Woodeson, barbarously expressed,) to ascertain the validity of the will. . . . When, by this means upon a verdict the validity of the will is fully established, the Court will, by its decree, declare it to be well proved, and that it ought to be established, and will grant a perpetual injunction."

B. STATUTORY REFORM IN ENGLISH PROBATE LAW AND ADMINISTRATION

In the first half of the nineteenth century there were various evidences of dissatisfaction with the existing system of probate as administered by the ecclesiastical courts. A commission appointed to inquire into the practice and jurisdiction of the ecclesiastical courts recommended a number of reforms in its report in 1832.³⁶ The Fourth Report of the Real Property Commissioners, filed in 1833, recommended the complete abolition of the jurisdiction of the ecclesiastical courts over testamentary matters.³⁷ In 1857 legislation was enacted which actually provided for this important change. A statute enacted in that year³⁸ established a court of probate presided over by a judge having "rank and precedence with the Puisne Judges of Her Majesty's superior courts of common law at Westminster." This court was designated as a court of record, and was vested with the voluntary and contentious jurisdiction in relation to the granting or revoking probate of wills and letters of administration. If a will disposed of both land and chattels, probate was made conclusive as to real estate just as it was with respect to chattels. It was provided, however, that the newly established court of probate should have no jurisdiction as to suits for legacies or for the distribution of residues.

³⁶ REPORT BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832).

³⁷ FOURTH REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY (1832) 65.

³⁸ 20-21 Vict., c. 77, § 8, p. 240 (1857).

By the first Judicature Act,³⁹ enacted in 1873 and effective in 1875, most of the various courts were consolidated to form a single unified court known as the Supreme Court of Judicature. This was composed of two parts, the High Court of Justice and the Court of Appeal. The jurisdiction of the High Court of Justice included jurisdiction formerly exercised by the Probate Court and the High Court of Chancery, as well as the jurisdiction of other courts. For administrative convenience, the High Court was divided into the following divisions: the Chancery Division; the King's Bench Division; the Common Pleas Division; the Exchequer Division; the Probate, Divorce and Admiralty Division. To the latter division was assigned the jurisdiction formerly belonging to the Probate Court.

The Land Transfer Act of 1897⁴⁰ provided that "Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate." It was further provided by the same enactment that the personal representative should hold title to and administer the real estate of the decedent.

The Supreme Court of Judicature Act of 1925, as amended,⁴¹ provides for a High Court of Justice of three divisions, namely, the Chancery Division, consisting of the Lord Chancellor and six puisne judges; the King's Bench Division, consisting of the Lord Chief Justice and nineteen puisne judges; and the Probate, Divorce and Admiralty Division, consisting of a President and four puisne judges. A puisne judge of the High Court must be qualified by being a barrister of ten years' standing. He receives a salary of £5000; but the Lord Chancellor receives £10,000 and the

³⁹ 36-37 Vict., c. 66, p. 191 (1873).

⁴⁰ 60-61 Vict., c. 65, p. 184 (1897).

⁴¹ 15-16 Geo. 5, c. 49, p. 1197 (1925); 25 Geo. 5, c. 2, p. 15 (1935); 1-2 Geo. 6, c. 2, p. 4 (1937); 1-2 Geo. 6, c. 67, p. 804 (1938); 4 HALSBURY, STATUTES OF ENGLAND 146, with amendments in 28 id. 33, 30 id. 129 and 31 id. 84.

Lord Chief Justice receives £8,000. Judges of the Court of Appeal receive the same salaries as the judges of the High Court.

Jurisdiction in the matter of decedents' estates is distributed among the three divisions of the High Court in much the same fashion as it was divided among the ecclesiastical courts, the court of chancery and the common-law courts, prior to the act of 1857. The Probate Division has exclusive jurisdiction of the probate of wills and the issuing of letters. Actions at law for or against the personal representative may be brought in the King's Bench Division. But administration may be had in chancery after letters are granted. In that case, actions at law against the personal representative would be stayed and creditors' rights would be settled in connection with the administration in equity. Appeals in matters of decedents' estates are taken from the High Court to the Court of Appeals just as in other matters.

There is a concurrent jurisdiction to admit to probate and grant letters in the county courts in the case of small estates,⁴² but judicial statistics would seem to indicate that this has rarely been taken advantage of.⁴³

It is, of course, inconceivable that five judges could handle, alone and unassisted, all the probate business for all the people of England. In fact, judicial statistics indicate that the great bulk of proceedings to admit wills to probate and for letters take the form of noncontentious proceedings and are heard before probate registrars.⁴⁴ This is, obviously, an administrative matter which does not require, in most cases, the actual personal supervision of the judge. But, of course, the judge

⁴² 24-25 Geo. 5, c. 53, §§ 60, 61, p. 531 (1934).

⁴³ CIVIL JUDICIAL STATISTICS, ENGLAND AND WALES, 1938 (1939) pp. 20, 21. This report shows that in 1938 there were 121 contentious probate actions tried and 258 motions heard by a judge. In noncontentious proceedings, in 1938, in the registries there were the following grants: 94,944 probates and letters of administration with the will annexed; 54, 808 letters of administration.

⁴⁴ CIVIL JUDICIAL STATISTICS, ENGLAND AND WALES, 1938 (1939) p. 43.

and the registrar are both a part of the unified judicial system, and some judicial supervision is always possible where it is needed.

There are four probate registrars⁴⁵ assisted by a staff of clerks. In addition, there are sixteen groups of district registrars, with a chief registry in each group and certain sub-registrars. To qualify as a probate registrar, one must be a practicing barrister or solicitor of ten years' standing, or a district probate registrar of five years' standing, or have served ten years as a clerk in the principal probate registry.

In considering the English system as a whole, one cannot fail to note the extensive changes that have taken place within the last hundred years. All matters of decedents' estates are now handled by one court. There is no possibility of conflicting rulings by different courts on questions of jurisdiction depriving a litigant of relief. This court is not an inferior court as was the ecclesiastical court, but is a court of general jurisdiction, whose judges receive a salary comparable to that of justices of the Supreme Court of the United States. The English system, however, distinguishes sharply between contentious and noncontentious business of the court. The latter being largely of an administrative character, is handled by probate registrars and their assistants. But if a contentious proceeding is necessary, either in the Chancery or the King's Bench Division, it may be heard by judges of the one great trial court of general jurisdiction of England.

The separation of jurisdiction between the Probate Division and the Chancery Division would seem still to be a mark of inefficiency. Indeed, in recent years there was an unsuccessful movement to transfer the probate of wills and granting of letters to the Chancery Division.⁴⁶ Nevertheless, since matters may be freely transferred from one division of the High

⁴⁵ 8 HALSBURY, LAWS OF ENGLAND, "Courts," (2d ed. 1933) § 1320, p. 601.

⁴⁶ BUSINESS OF THE COURTS COMMITTEE, INTERIM REPORT (1933).

Court to another, it would seem that procedural difficulties arising from this divided jurisdiction are not great.⁴⁷

II. DEVELOPMENT OF AN AMERICAN COUNTERPART OF ENGLISH PROBATE JURISDICTION

A. THE TRANSITION PROCESS

We have traced thus far the evolution of probate courts in England from a system in which the complete administration of an estate could and frequently did require judicial proceedings in three courts to the modern organization under which probate business is handled in a single court—the High Court of Justice. We turn now to the establishment of probate courts in America. Some of the English historical influences are to be noted in the early development of our own probate court organizations. But mixed with these influences were some courageous attempts to establish one court possessing the combined powers of the English ecclesiastical, common-law, and chancery courts. The objective was a system under which an entire probate proceeding could be conducted and supervised, in one court, from the probate of a will and grant of letters to the final distribution of the estate. Due to variations in populations, community needs, considerations of expense, and natural local differences in opinion, different systems of probate courts have developed.

In very early colonial times testamentary jurisdiction was commonly given to the General Courts or vested in the governors and their councils. Somewhat later it was given to county or other trial courts as they were established, although the General Courts frequently continued to exercise some testamentary jurisdiction. By the middle of the seventeenth

⁴⁷ A large portion of probate business is handled in the Probate Division; and recourse to the Chancery and King's Bench Divisions yet remains for certain contentious matters in the administration of decedents' estates. But all are in the same High Court of Justice.

century numerous variations had developed in the colonies.⁴⁸

In some instances the governor was made the ordinary, although it was common for him to commission deputies or surrogates to probate wills and grant letters, reserving to himself supervisory control over their acts by way of appeal.⁴⁹ Orphans' courts were created in several states to include jurisdiction over executors and administrators as well as guardians.⁵⁰ Elsewhere probate jurisdiction was lodged in the established courts—superior courts in some places,⁵¹ inferior courts in others.⁵²

The first plan of having the governor appoint deputies or surrogates to probate wills and grant letters constituted but a slight departure from the practice of the English ecclesiastical courts. The creation of separate orphans' courts with many of the powers possessed by all three courts under the English system was a step in recognizing the need for a unification of the processes of probate and administration. And conferring

⁴⁸ For a summary of these developments and variations, see POUND, *ORGANIZATION OF COURTS* (1940) 26-80.

⁴⁹ *Acts Passed by the General Assembly of the Colony of Georgia, 1755-1774*, published by Jones (1881) 5; *THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH*, edited by Brigham (1836) 32; 1 *Laws of New Hampshire, 1679-1702*, edited by Batchellor (1904) 206-207 (act of 1687); *Acts and Laws of New Hampshire, 1696-1725*, printed by Green (1726) 101 (act of 1718); *Acts and Laws of New Hampshire*, printed by Fowle (1771) 205-206 (act of 1771); *Acts of the Province of New Jersey*, printed by Bradford (1732) 38 (act of 1713); 1 *Laws of New York, 1691-1751*, printed by Parker (1752) 14-15 (act of 1692); *Laws of North Carolina*, edited by Potter (1821) 112 (act of 1715); *Acts and Laws of Rhode Island*, printed by James Franklin (1730) 5-7 (act of 1663); 7 *Statutes at Large of South Carolina*, edited by McCord, 172 (act of 1721).

⁵⁰ See notes 54-58, *infra*.

⁵¹ See notes 68-70, *infra*.

⁵² 2 *PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, 1665-1678*, edited by Trumbull (1852) 39 (act of 1666) (county courts); 1 *Laws of New Hampshire, 1679-1702*, edited by Batchellor (1904) 206-207 (act of 1687); *Complete Revisal of the Acts of Assembly of the Province of North Carolina*, printed by Davis (1773) 524-525 (act of 1773) (to probate wills, grant letters and determine controversies in intestate estates in matters not involving more than £50).

this jurisdiction upon general trial courts already established served to unite probate jurisdiction with general judicial administration.

B. AMERICAN INNOVATIONS

In observing the evolution of probate courts in America, three aspects in their development are to be noted: the range of their powers, the scope of their jurisdiction, and the particular forms assumed by them.

The powers lodged in the various bodies, persons or courts were extremely limited in the early stages of probate development. In many cases they consisted merely of the power to probate wills and grant letters, following the practice of the ecclesiastical courts. Very gradually these powers were extended to include a needed control and supervision over executors and administrators in their administration of estates.⁵³ But the process of increasing powers of control in probate courts cannot yet be called complete in any state. All too often resort must be had to equity or common-law courts to sell land to pay debts, to partition land in connection with distribution, to contest wills, to construe them, or even to adjudicate contested claims against an estate.

In Pennsylvania,⁵⁴ Maryland,⁵⁵ Delaware,⁵⁶ Virginia⁵⁷

⁵³ For substantiation of this development in particular states see opinion of Daly, J., in *Brick's Estate*, 15 Abb. Pr. 12 (N. Y. 1862); opinion of Werner, J., in *Matter of Runk*, 200 N. Y. 447, 452-456, 94 N. E. 363 (1911); REDFIELD, *SURROGATES' COURTS IN NEW YORK* (4th ed. 1890) 1-17; Atkinson, "The Development of the Massachusetts Probate System," 42 MICH. L. REV. 425 (1943); opinion of Woodward, J., in *Horner & Roberts v. Hasbrouck*, 41 Pa. 169, 177-179 (1862); REPPY and TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS* (1928) 174-177 (for New Jersey); WOERNER, *ADMINISTRATION* (3d ed. 1923) 478, 489.

⁵⁴ Act of 1713, in 1 *Laws of Pennsylvania, 1700-1781*, edited by Dallas (1797) 98. See also *Abridgment of Laws of Pennsylvania, 1700-1811*, edited by Purdon (1811) 407. This act reestablished orphans' courts which had been discontinued in Pennsylvania. Reference to their existence as early as 1693 may

and New Jersey ⁵⁸ separate orphans' courts were early established.

"The idea was taken from the Court of Orphans of the city of London, which had the care and guardianship of children of deceased citizens of London in their minority, and could compel executors and guardians to file inventories, and give securities for their estates. . . . The Court of Orphans was one of the privileges of that free city; and that the people of Pennsylvania might enjoy the same protection, it was transplanted into our law, at first without any change of name, but afterwards called the Orphans' Court. The beginnings of this court were feeble. But it grew in importance with the increase of wealth and population, was recognized in our Constitution of 1776, and in each of our subsequent constitutions, and has been the subject of innumerable Acts of Assembly." ⁵⁹

Thus a jurisdiction over the persons and estates of minors came to include the administration of decedents' estates. Elsewhere guardianship and curatorship (or conservatorship, as it is sometimes called) has been appended to probate jurisdiction. And in many states there has been added adoption proceedings, change of name, solemnization of marriages, and even the granting of divorces. More closely connected with the administration of estates, the administration of state inheritance or transfer taxes, supervision of testamentary trusts, and more

be found in 1 Charters and Acts of Assembly of the Province of Pennsylvania, printed by Miller (1762) app., p. 9.

⁵⁸ Laws of Maryland, printed by Green (1777) c. 8 (act of February, 1777); id. c. 9 (act of October, 1777).

⁵⁶ Act of 1721 in 1 Laws of Delaware, 1700-1797, printed by Samuel and John Adams (1797) 87-94. Later references to orphans' courts in Delaware may be found in an act of 1742, in Laws of the Government of New-Castle, Kent, and Sussex upon Delaware, printed by B. Franklin (1751) 273-282, entitled "An Act for the better Settling Intestates' Estates."

⁵⁷ For a statute providing for the annual holding of an orphans' court in Lunenburg County, Virginia, see Act of 1748 in 6 Statutes at Large of Virginia, edited by Hening (1819) 210.

⁵⁸ Act of 1846. See Nixon's Digest of the Laws of New Jersey, 1709-1855 (1855) p. 550.

⁵⁹ From the opinion of Woodward, J., in *Horner & Roberts v. Hasbrouck*, 41 Pa. 169 at 178 (1862).

recently of inter vivos trusts, have been added. The extent of these superimposed functions will be discussed later.

From the summary already given it is apparent that there was no general agreement as to the form of tribunal for the administration of estates. This function, bestowed upon the town councils by Rhode Island, remains there to this day, although each council may elect a probate judge to preside in the local probate courts.⁶⁰ Probate judges are still appointed by the governor in New Hampshire,⁶¹ following the early practice when the governor appointed commissioners to probate wills.⁶² The surrogates in New York and New Jersey, originally appointed by the governor or prerogative court,⁶³ are now elected by the electors of each county.⁶⁴ In New York the extent of their powers and scope of their jurisdiction have been vastly increased. New Jersey, on the contrary, has restricted the surrogate to the probate of wills and grant of letters only when there is no contest;⁶⁵ in case of contest and in most other matters resort must be had to the orphans' or prerogative court.⁶⁶ The separate orphans' courts early established in Pennsylvania, Maryland and Delaware, and later in New Jersey, are still continued.⁶⁷ And the separate probate courts established elsewhere have in the main persisted.

But significant innovations were launched in three states. As early as 1721 South Carolina conferred upon its county and precinct courts "full power to determine the right of adminis-

⁶⁰ R. I. Gen. Laws (1938) c. 568, § 3.

⁶¹ N. H. Const., arts. 46, 73.

⁶² 1 Laws of New Hampshire, 1679-1702, edited by Batchellor (1904) 206 (act of 1687).

⁶³ See *Brick's Estate*, 15 Abb. Pr. Rep. 12 at 24-28 (N. Y. 1862); and in the *Matter of Coursen's Will*, 4 N. J. Eq. 408 at 413-414 (1843).

⁶⁴ N. Y. Const., art. 6, § 13; N. J. Const., art. 7, § 2, par. 5.

⁶⁵ N. J. Rev. Stat. (1937) §§ 3:2-22, 3:7-5.1.

⁶⁶ N. J. Rev. Stat. (1937) §§ 3:2-22; 3:7-5.1; 3:7-23.1; 3:27 to 3:32; (Supp. 1941-43) 3:7-13.4; 3:7-13.5.

⁶⁷ Pa. Const., art. 5, § 22; Md. Const., art. 4, § 1; Del. Const., art. 4, §§ 1, 33; N. J. Rev. Stat. (1937) § 2:7-1.

tration of the estates of persons dying intestate . . . and also all disputes concerning wills and executorships, in as full and ample manner as the same have or might have been heretofore determined by any Governor, or Governor and Council.”⁶⁸ In 1778 Georgia conferred jurisdiction upon its superior courts “to determine in all matters of dispute concerning the proving of wills and granting letters of administration.”⁶⁹ In 1773 North Carolina conferred jurisdiction upon its superior courts in “all Suits and Matters relative to Legacies, filial Portions, Estates of Intestates.”⁷⁰ Here in courts of general jurisdiction, compounded with civil and criminal jurisdiction, was the administration of estates. However, this plan of conferring powers of probate and administration upon courts of general jurisdiction was not to be permanent in any of these three states.⁷¹ It remained for other states to initiate a movement which would unite probate jurisdiction with law and equity.

One minor phenomenon of consolidation occurred early, however, which has had an unfortunate effect upon probate courts. Under the stress of quantity of judicial business the establishment of inferior county courts with a limited civil and criminal jurisdiction was common. Probate powers were added to their jurisdiction in several states.⁷² In thirteen

⁶⁸ 7 Statutes at Large of South Carolina, edited by McCord (1840) 172 (act of 1721).

⁶⁹ Digest of the Laws of Georgia to 1799, edited by Watkins (1800) 226.

⁷⁰ Complete Revisal of all the Acts of Assembly of the Province of North Carolina, printed by Davis (1773) 511. See also Laws of North Carolina, edited by Iredell (1791) 296-297 (act of 1777).

⁷¹ In South Carolina the office of ordinary was established in 1799. See Acts of South Carolina, 1795-1804, printed by Faust (1808) 315.

In Georgia probate powers were vested in a register of probate appointed by the legislature in each county beginning in 1777. Georgia Constitution of 1777, compiled by Marbury & Crawford (1802) art. 52. See also REDFEARN, *WILLS AND ADMINISTRATION OF ESTATES IN GEORGIA* (1938) 153.

North Carolina conferred probate powers upon county courts in 1837. Laws of North Carolina, 1836-37, printed by Lemay (1837) 55.

⁷² POUND, *ORGANIZATION OF COURTS* (1940) 83-85, 137.

states⁷³ at the present time probate matters come under the jurisdiction of county courts. Often these courts are presided over by judges who are untrained in law. As a consequence their decisions are usually reviewable on appeal by a trial *de novo* in courts of general jurisdiction. Certainly this fusion of probate courts with county courts has not produced any elevation of probate courts in the public esteem. On the contrary, it has undoubtedly been a factor in minimizing the importance of probate matters.

III. CLASSIFICATION OF AMERICAN PROBATE COURTS

A. VARIATIONS OF PROBATE COURT ORGANIZATION IN THE SAME STATE

Before attempting a classification of present-day probate courts, it should be emphasized that the system of probate courts in several states is not unitary and hence not susceptible of a single classification. Under some systems two separate tribunals have been created to supervise the complete administration of an estate. In other states different kinds of tribunals exist in different counties of the same state for administering probate matters. Where either of these situations exist, each court or kind of court must be considered separately in the appraisal to follow, and may require one, two, or even three classifications for the probate courts of a single state.

1. *Probate courts as single or multiple units*

In a number of states certain remnants of the tri-court system under the English ecclesiastical practice still persist. The New Jersey system suggests considerable early English influence. Its intricacies can only be appreciated by a detailed

⁷³ Colorado, Florida, Illinois, Kentucky, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, West Virginia and Wisconsin.

description. Three courts have probate jurisdiction: the surrogate's court, the orphans' court and the prerogative court. There is one prerogative court for the entire state presided over by the chancellor sitting as ordinary or surrogate general.⁷⁴ There is one surrogate in each county⁷⁵ and also one orphans' court in each county.⁷⁶ The surrogate is both the judge and clerk of his own court;⁷⁷ he is also clerk of the orphans' court.⁷⁸ The prerogative court has jurisdiction throughout the state to probate wills, grant letters and to hear and finally determine disputes that arise thereon.⁷⁹ The surrogate of each county also has power to probate wills and grant letters except when doubt appears on the face of a will or a caveat is filed against a will or a dispute or contest arises as to the existence of a will or the right to letters.⁸⁰ In any of these cases the matter is transferable to the orphans' court.⁸¹ In general the orphans' courts have no original jurisdiction to probate wills or grant letters. Their sole jurisdiction to do so arises on *transfer* from the surrogate in case the matter is disputed or contested.⁸² The orphans' courts also have power to grant allowances to widows and children pending a will contest,⁸³ to determine heirship of an intestate where real estate is involved,⁸⁴ to approve compromises of will contests or claims of the estate against a third person,⁸⁵ to order the sale of real estate for the payment of debts,⁸⁶ determine rights of

⁷⁴ N. J. Const., art. 6, § 4, par. 2.

⁷⁵ N. J. Rev. Stat. (1937) § 2:7-12.

⁷⁶ N. J. Rev. Stat. (1937) § 2:7-1.

⁷⁷ N. J. Rev. Stat. (1937) § 2:31-4, 2:31-16.

⁷⁸ N. J. Rev. Stat. (1937) § 2:7-4.

⁷⁹ N. J. Rev. Stat. (1937) § 3:1-1.

⁸⁰ N. J. Rev. Stat. (1937) §§ 3:2-22 and 3:7-5.1.

⁸¹ Ibid.

⁸² Ibid.

⁸³ N. J. Rev. Stat. (1937) § 3:2-29.

⁸⁴ N. J. Rev. Stat. (1937) §§ 3:4-1 to 3:4-3.

⁸⁵ N. J. Rev. Stat. (1937) § 3:15.

⁸⁶ N. J. Rev. Stat. (1937) § 3:25-23.

beneficiaries under a will or of the next of kin in an estate,⁸⁷ and determine controversies respecting allowances of accounts.⁸⁸ In short, the jurisdiction of the surrogate is limited to the probate of wills and issuance of letters in nonadversary proceedings. The remainder of the administration is had in the orphans' court. The probate of a will may be either before the surrogate of the proper county or in the prerogative court.⁸⁹ Thus, if a proceeding is initiated before the local surrogate, the services of the orphans' court will certainly be required; but if a proceeding is initiated in the prerogative court in the first instance that court has power to conduct the entire proceeding.

In North Carolina there is a similar division of probate jurisdiction between the clerk of the superior court and the superior court itself. Indeed the clerk is himself a court⁹⁰ and handles most of the details of administration. However, in the case of a contest on probate of a will or grant of letters, the matter is transferred to the superior court for the hearing.⁹¹ The clerk may order the sale of personal property,⁹² but resort must be had to the superior court for the sale of land.⁹³ Also the clerk has jurisdiction with respect to the inventory and accounting.⁹⁴ Much the same division of jurisdiction prevails in Virginia. The clerk, as well as the court, has power to probate wills and grant letters.⁹⁵ But any decision of the clerk may be appealed to the circuit court or its equivalent.⁹⁶ Probably the clerk does not have as much power as the clerk in North

⁸⁷ N. J. Rev. Stat. (1937) §§ 3:26-2, 3:26-6.

⁸⁸ N. J. Rev. Stat. (1937) § 3:1-2.

⁸⁹ N. J. Rev. Stat. (Supp. 1938-40) § 3:2-3.

⁹⁰ N. C. Gen. Stat. (1943) §§ 2-1, 28-1; *Edwards v. Cobb*, 95 N. C. 4 (1886). For a statement of the history of this allocation of probate jurisdiction see *Hardy & Co. v. Turnage*, 204 N. C. 538, 168 S. E. 823 (1933).

⁹¹ N. C. Gen. Stat. (1943) § 28-30.

⁹² N. C. Gen. Stat. (1943) §§ 28-73 to 28-80.

⁹³ N. C. Gen. Stat. (1943) § 28-81.

⁹⁴ N. C. Gen. Stat. (1943) §§ 28-50, 28-117, 28-118.

⁹⁵ Va. Code (1942) §§ 5247, 5249.

⁹⁶ Va. Code (1942) § 5249.

Carolina. It is sufficient to note, however, that in both of these states the clerk has judicial powers and shares with the court of general jurisdiction the control over the administration of estates. Likewise in Delaware the register of wills in each county has power to probate wills, grant letters, remove representatives, approve bonds, pass upon accounts and settlements of representatives and to grant discharges.⁹⁷ But a proceeding to sell land to pay debts must be had in the orphans' courts.⁹⁸ Pennsylvania also has a register in each county who has power to probate wills and grant letters.⁹⁹ Other matters in connection with the administration of an estate are handled in the orphans' court.¹⁰⁰

The important thing to observe in all these cases is the division of jurisdiction between two tribunals. The first of these, variously called the surrogate, the register of wills, or the clerk, performs a function limited for the most part to the probate of wills and grant of letters; and, under the practice of some states, only when the matter is not contested. In other states, such as Delaware, the register of wills has quite broad powers, making it possible for most of the administration to be done under his supervision. The second of these tribunals, variously called the orphans', the superior, district, or circuit court, supervises the remainder of the administration and especially in matters that are more likely to be contentious or involve more than ministerial functions.

In several other states the clerk of the probate court has power to admit wills to probate and grant letters on exceptional occasions,¹⁰¹ such as in the absence of the judge or in

⁹⁷ Del. Rev. Code (1935) §§ 3799, 3804, 3807, 3811, 3813, 3844 and 3866.

⁹⁸ Del. Rev. Code (1935) c. 99. By means of appeal from the register's court, most other matters can be heard in the orphans' court. Del. Rev. Code (1935) §§ 3835, 3843; Del. Const., art. 4, § 34. But appeals from certain other matters lie directly to the superior court. Del. Rev. Code (1935) §§ 3827, 3866.

⁹⁹ Pa. Stat. Ann. (Purdon, 1930) t. 20, § 1861.

¹⁰⁰ Pa. Stat. Ann. (Purdon, 1930) t. 20, §§ 2241 through 2254.

¹⁰¹ See discussion under VII-B, *infra*.

vacation of the court, but these are regarded as extraordinary rather than ordinary powers.

2. *Different kinds of probate courts in the same state*

From the very beginning there was a tendency to establish a probate court in each county.¹⁰² But variations in population and considerations of expense have led to the establishment of different kinds of probate courts within the same state.

In Indiana probate jurisdiction has been conferred upon the circuit courts of each county.¹⁰³ However, in Marion and Vanderburgh counties, two populous counties of the state, separate probate courts have been established to handle the administration of estates.¹⁰⁴ These probate courts are separate from the circuit courts of these counties but are fully coordinate with them.

In Oregon the county courts have been given probate jurisdiction;¹⁰⁵ but, in counties having a population of over 30,000, county courts have been abolished and county judges made circuit judges to preside over the "department of probate" in the circuit courts of those counties.¹⁰⁶ The probate courts in these larger counties are not unlike those in Indiana except that the former may be said to be an integral part of the court of general jurisdiction, rather than coordinate with it.

In New Mexico the district court has had concurrent jurisdiction with the probate court in all probate matters since 1941¹⁰⁷ and any estate of \$2,000 or more may be "appealed" [transferred] to the district court.¹⁰⁸ Thus probate jurisdiction is optional in either of two courts.

¹⁰² POUND, ORGANIZATION OF COURTS (1940) 136, 250.

¹⁰³ Ind. Stat. (Burns, 1933) § 4-303.

¹⁰⁴ Ind. Stat. (Burns, 1933) §§ 4-2901, 4-3001.

¹⁰⁵ Ore. Const., art. 7, § 12.

¹⁰⁶ Ore. Comp. Laws (1940) §§ 93-310, 13-206, 13-207, 13-209.

¹⁰⁷ N.M. Stat. (1941) § 16-312.

¹⁰⁸ N.M. Stat. (1941) §§ 16-419, 16-420.

In Alabama the probate court does not have exclusive jurisdiction. Administration in equity remains optional;¹⁰⁹ or a proceeding commenced in the probate court may be removed to the circuit court.¹¹⁰ Thus probate jurisdiction in Alabama is possible in any one of three courts, each of which has adequate and complete power to function.

In Tennessee probate jurisdiction is vested in the county courts composed of all the justices of the peace of the county.¹¹¹ Judicial powers are exercised by the chairman who is, in effect, the probate judge.¹¹² However, when no person has applied or can be procured to administer upon an estate, chancery has jurisdiction to appoint a representative after six months.¹¹³ A proceeding to sell real estate may be had either in the county, the circuit, or the chancery court.¹¹⁴ Appeals from the county court ordinarily lie to the circuit court,¹¹⁵ but to the court of appeals or the supreme court if jurisdiction in the particular matter appealed from is concurrent with the circuit or chancery courts.¹¹⁶

In Vermont most appeals from the probate court go to the county court,¹¹⁷ but an appeal on a question of law goes directly to the supreme court.¹¹⁸ In this one respect the probate courts of Vermont require a double classification.

In Wisconsin probate jurisdiction has been vested in the county courts throughout the state.¹¹⁹ The judges of these county courts, however, must be members of the bar except in counties having a population of less than 14,000 in which

¹⁰⁹ Ala. Const., art. 6, § 149.

¹¹⁰ Ala. Code (1940) t. 13, §§ 138 through 144.

¹¹¹ Tenn. Code (Michie, 1938) §§ 10193, 10225.

¹¹² Tenn. Code (Michie, 1938) §§ 10202, 10204.

¹¹³ Tenn. Code (Michie, 1938) § 8155.

¹¹⁴ Tenn. Code (Michie, 1938) § 10226.

¹¹⁵ Tenn. Code (Michie, 1938) §§ 9028, 9060.

¹¹⁶ Tenn. Code (Michie, 1938) §§ 9029, 9059.

¹¹⁷ Vt. Pub. Laws (1933) § 3002.

¹¹⁸ Vt. Pub. Laws (1933) § 3001.

¹¹⁹ Wis. Stat. (1943) § 253.01.

case they may be lay judges.¹²⁰ Appeals from county courts in counties having a population of more than 15,000 go directly to the supreme court and are heard upon the record of the proceedings below, but in counties having a population of 15,000 or less (of which there are some twelve counties) appeals lie to the circuit court and are heard *de novo*.¹²¹

Ohio provides for separate probate courts in each county, but counties of less than 60,000 population are authorized to "consolidate" their probate court with the local court of common pleas, such "consolidated court" to be presided over by the judge of the common pleas court.¹²² This does not operate to extinguish the probate court but merely to provide for a unified personnel.¹²³ Appeals from probate courts in Ohio go directly to a court of appeals, provided that a record has been made of the probate proceedings; but if a record has not been taken of the proceedings an appeal lies to the court of common pleas of that county, where there is a trial *de novo*.¹²⁴ It is a matter of common knowledge among lawyers in Ohio that parties avail themselves of this second trial in the common pleas courts in most cases. Where there has been a "consolidation" of the probate courts with common pleas courts, this may mean a trial *de novo* before the same judge—a useless and futile gesture, it would seem. But because of this variation in the method of appeal, the probate courts of Ohio occupy two positions in the hierarchy of courts.

A similar "consolidation" of courts exists also in New York and Pennsylvania. Separate surrogates' courts in New York and separate orphans' courts in Pennsylvania exist in every

¹²⁰ Wis. Stat. (1943) § 253.02.

¹²¹ Wis. Stat. (1943) § 324.01.

¹²² Ohio Const., art. 4, § 7; Ohio Gen. Code (Page, 1937) §§ 10501-4, 10501-47.

¹²³ State ex rel. Sattler v. Cahill, 122 Ohio St. 354, 171 N.E. 595 (1930).

¹²⁴ Ohio Gen. Code (Page, Supp. 1943) § 10501-56.

county.¹²⁵ But in counties of less than 40,000 population in New York the county judge also presides over the surrogate court of that county, whereas in counties having a larger population the legislature may provide for a separate surrogate.¹²⁶ Similarly in counties of not more than 150,000 population in Pennsylvania the common pleas judge presides over the orphans' court, but in larger counties the legislature must, and in any other county may, establish separate orphans' courts.¹²⁷ In both of these states the courts performing probate functions are distinct. The "consolidation," as in Ohio, is one of judicial personnel, prompted in each case by economical considerations in the less populous communities.

B. NORMS TO BE APPLIED IN ANALYZING AMERICAN PROBATE JURISDICTION

Up to this point we have considered the multiple character of probate court organization in some states and the variations of organization in the same state. It is now our purpose to classify all probate court organizations on the basis of their most important characteristics. Before doing this, however, it is desirable to discuss the norms to be applied in making this classification.

Probate courts have been variously classified as courts of "limited," "inferior," "special and limited," "limited though not special," or "limited though not inferior" jurisdiction; and also as courts of "general," "superior" or "coordinate" jurisdiction.¹²⁸ These descriptives are not only inconsistent but are likely to represent but partial views. It is true that their predecessors, the ecclesiastical courts, were not courts of gen-

¹²⁵ N.Y. Const., art. 6, § 13; Pa. Const., art. 5, § 22.

¹²⁶ N.Y. Const., art. 6, § 13.

¹²⁷ Pa. Const., art. 5, § 22. As to the counties in which the legislature has established separate orphans' courts to be presided over by separate orphans' judges, see Pa. Stat. Ann. (Purdon, 1930) t. 20, §§ 2083, 2641, 2661, 2681, 2701 and Pa. Stat. Ann. (Purdon, Supp. 1943) t. 20, §§ 2706, 2723a, 2731.

¹²⁸ See references cited in 1 WOERNER, ADMINISTRATION (3d ed. 1923) 484; 1 CLEVELAND, HEWITT and CLARK, PROBATE LAW AND PRACTICE OF CONNECTICUT (1929) 132.

eral jurisdiction.¹²⁹ Nor were they courts of record. Nevertheless, they were "courts," and their judgments were subject to recognition and obedience through the process of excommunication.¹³⁰ The establishment of probate courts in America was made without any such limitations on their powers.¹³¹ Nevertheless, a number of reasons have contributed to their characterization as "inferior" in certain respects.

As will be seen from the discussion which follows, it is not easy to classify probate courts under our systems of court organization. By creating them and giving them power to probate wills and supervise the administration of estates, we have set off to them a specialized function. Because of this specialized task assigned to them, we have been inclined to call them courts of "special or limited jurisdiction," and, therefore, of "inferior jurisdiction."¹³² Upon a little consideration, it will be seen that this conclusion is not warranted. In giving this jurisdiction to the probate courts, we have in the same process *not* given it to the general trial courts which we call "courts of general jurisdiction." In matters probate, therefore, probate courts truly have "general jurisdiction."

To courts of general jurisdiction, we have indulged a presumption in favor of the regularity of their proceedings and the validity of their judgments. No such presumption is made in the case of courts of inferior jurisdiction.¹³³ In actions at law, general trial courts have general jurisdiction. In probate matters it can equally be said that trial courts do not have, but that probate courts do have, general jurisdiction. In these respective fields, it should be clear that each court is a court of original jurisdiction, not superior or inferior in the first

¹²⁹ 1 WOERNER, ADMINISTRATION (3d ed. 1923) § 140.

¹³⁰ 3 BLACKST. COMM. 101.

¹³¹ 1 WOERNER, ADMINISTRATION (3d ed. 1923) 481.

¹³² For an early example of this type of reasoning, see *Strouse v. Drennan*, 41 Mo. 289 at 297 (1867).

¹³³ For a concise summary of this doctrine and its origin, see 1 WOERNER, ADMINISTRATION (3d ed. 1923) § 143.

instance, as to any other court. Despite this seemingly simple statement, there has not been general agreement that a probate court is one of general jurisdiction within its field of operation. Indeed, the constitution of Missouri at one time provided that "inferior tribunals shall be established in each county for the transaction" of probate matters.¹³⁴ By the same constitution, they were also made courts of record. Despite the inferiority intended for them, it was held that "their jurisdiction pertaining to wills and administrators is general . . . and the same may be said of the circuit court; but their action, on subjects exclusively and originally confided to them, is entitled to the same weight as that of any other court of record."¹³⁵ Thus, despite the commands of the constitution, probate courts in Missouri were held courts of general jurisdiction within a defined sphere and their jurisdiction "as general as that of the circuit court." Accordingly, their proceedings and judgments operating upon subjects within a defined sphere were entitled to the same presumptions of regularity and validity as those of courts of general jurisdiction.

The inferior position accorded to probate courts historically has left its indelible mark upon the effect accorded to their proceedings. The rule was early developed that "inferior jurisdictions and special authorities, must show their jurisdiction, and must pursue their authority strictly."¹³⁶ The result has been that every stage of a probate proceeding must laboriously recite each fact upon which its jurisdiction is predicated. Otherwise a sale or judgment is void and is subject to collateral attack—a vulnerability well known to every title

¹³⁴ Mo. Const. of 1820, art. 5, § 12.

¹³⁵ *Johnson v. Beazley*, 65 Mo. 250 at 256 (1877). See also *Schultz v. Schultz*, 10 Gratt. (51 Va.) 358, 377-379 (1853).

¹³⁶ *Morrow v. Weed*, 4 Iowa 79 at 124 (1856). This case contains an excellent statement of the foundations of this doctrine, its unfortunate consequences, and a resumé of the authorities at that date.

examiner. The resulting blemish upon land titles and consequent relitigation of all the matters supposedly concluded in the probate court are facts too well known to require comment. After this rule became well entrenched, remedial measures were commenced. First, probate courts were made courts of record. Then presumptions were made as to the regularity of their proceedings and validity of their judgments. The importance of these two steps cannot be overstated.

By statute in a number of states at the present time proceedings of probate courts are now accorded the same presumptions of regularity and validity as those of courts of general jurisdiction.¹³⁷ Elsewhere such a presumption has been made even in the absence of statute.¹³⁸ In Connecticut, Florida, Maine, Maryland, Vermont and Wisconsin, however, no such pre-

¹³⁷ Ala. Code. (1940) t. 13, § 278; Idaho Code (1932) § 1-1203; Mass. Ann. Laws (1932) c. 215, § 2; N.M. Stat. (1941) § 16-411; N.D. Comp. Laws (1913) § 8533; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2085; R.I. Gen. Laws (1938) c. 573, § 8; S.D. Code (1939) § 35.0105; Utah Code (1943) § 102-14-15.

¹³⁸ *Arizona*. Varnes v. White, 40 Ariz. 427 at 431, 12 P. (2d) 870 (1932); *Arkansas*. Massey v. Doke, 123 Ark. 211, 185 S.W. 271 (1916); Graham v. Graham, 175 Ark. 530, 1 S.W. (2d) 16 (1927);

California. Luco v. Commercial Bank, 70 Cal. 339, 11 P. 650 (1886); Burris v. Kennedy, 108 Cal. 331 at 338, 41 P. 458 (1895);

Georgia. Stanley v. Metts, 169 Ga. 101, 149 S.E. 786 (1929); Wood v. Crawford, 18 Ga. 526 (1855);

Illinois. Illinois Merchants' Trust Co. v. Turner, 341 Ill. 101, 173 N.E. 52 (1930); Housh v. People, 66 Ill. 178 (1872); People v. Cole, 84 Ill. 327 (1876); People v. Gray, 72 Ill. 343 (1874); Matthews v. Hoff, 113 Ill. 90 (1885);

Indiana. Sims v. Gay, 109 Ind. 501, 9 N. E. 120 (1886);

Iowa. McFarland v. Stewart, 109 Iowa 561, 80 N. W. 657 (1899);

Kansas. Denton v. Miller, 110 Kan. 292, 203 P. 693 (1922);

Kentucky. Goss' Exr. v. Ky. Refining Co., 137 Ky. 398, 125 S. W. 1061 (1910);

Michigan. Church v. Holcomb, 45 Mich. 29, 7 N. W. 167 (1880); Chapin v. Chapin, 229 Mich. 515, 201 N. W. 530 (1924);

Minnesota. Davis v. Hudson, 29 Minn. 27, 11 N. W. 136 (1881);

Mississippi. Gillespie v. Hauenstein, 72 Miss. 838, 17 So. 602 (1895);

Missouri. Johnson v. Beazley, 65 Mo. 250 (1877); Desloge v. Tucker, 196 Mo. 587 at 601, 94 S. W. 283 (1906);

Nebraska. Foote v. Chittenden, 106 Neb. 704 at 707, 184 N. W. 167 (1921);

New Hampshire. Kimball v. Fisk, 39 N. H. 110 (1859);

sumption is indulged.¹³⁹ This presumption, according to the judicial acts of probate courts the same force and effect as to those of courts of general jurisdiction, represents a noteworthy and important step in their development.

A second important test of a court's position in any judicial organization is whether it has been made a "court of record." Most, but not all, probate courts in this country have been created or subsequently made courts of record.¹⁴⁰ This being

New Jersey. Plume v. Howard Savings Inst., 46 N. J. L. 211 (1884) (as to orphans' court);

New York. Van Deusen v. Sweet, 51 N. Y. 378 (1873); Bearns v. Gould, 77 N. Y. 455 (1879); Harrison v. Clark, 87 N. Y. 572 (1882); O'Conner v. Huggins, 113 N. Y. 511 (1889);

Ohio. Shroyer v. Richmond, 16 Ohio St. 455 (1866);

Oklahoma. Hunter v. Wittier, 120 Okla. 103, 250 P. 793 (1926); Drum v. Aetna Cas. & Surety Co., 189 Okla. 307, 116 P. (2d) 715 (1941);

Oregon. Russel v. Lewis, 3 Ore. 380 (1872); Slate's Estate, 40 Ore. 349, 68 P. 399 (1902);

South Carolina. Clark v. Neves, 76 S. C. 484, 57 S. E. 614 (1906);

Tennessee. Townsend v. Townsend, 44 Tenn. 70 (1867);

Texas. Reeves v. Fuqua (Tex. Civ. App. 1916) 184 S. W. 682; Jones v. Sun Oil Co. (Tex. Civ. App. 1940) 145 S. W. (2d) 615 rev'd on other grounds, 137 Tex. 353, 153 S. W. (2d) 571 (1941); Tucker v. Imperial Oil and Development Co. (Tex. Civ. App. 1921) 233 S. W. 339;

Virginia. Saunders v. Link, 114 Va. 285, 76 S. E. 327 (1912);

Washington. In re Upton's Estate, 199 Wash. 447, 92 P. (2d) 210 (1939); Christianson v. King County, 239 U. S. 356, 36 S. Ct. 114 (1915);

West Virginia. State ex rel. Conley v. Thompson, 100 W. Va. 253, 130 S. E. 456 (1925);

Wyoming. Lethbridge v. Lauder, 13 Wyo. 9, 76 P. 682 (1904).

¹³⁹ *Connecticut.* Palmer v. Palmer, (D. C. Conn. 1940) 31 F. Supp. 861;

Florida. State ex rel. Everette v. Petteway, 131 Fla. 516, 179 So. 666 (1938), 135 Fla. 757, 185 So. 619 (1939);

Maine. Appeal of Waitt, 140 Me. 109, 34 A. (2d) 476 (1943);

Maryland. Talbot Packing Corp. v. Wheatley, 172 Md. 365, 190 A. 833 (1937);

Vermont. Probate Court v. Indemnity Ins. Co. of No. America, 106 Vt. 207, 171 A. 336 (1934); Abbott v. Abbott, 112 Vt. 449, 28 A. (2d) 375 (1943);

Wisconsin. Estate of Anson, 177 Wis. 441, 188 N. W. 479 (1922); Estate of Ott, 228 Wis. 462, 279 N. W. 618 (1938). This last Wisconsin case is based on Wis. Stat. (1943) § 310.045 which requires the petition for letters to allege and the order to find the facts necessary to the jurisdiction of the court. But see Wis. Stat. (1943) § 316.33 which prevents the invalidation of a sale by a representative except for causes that would invalidate it had it been made pursuant to an order of a court of general jurisdiction.

¹⁴⁰ Ala. Const., art. 6, § 148; Ariz. Const., art. 6, § 10; Cal. Const., art. 6, § 12; Colo. Const., art. 6, § 23; Fla. Stat. Ann. (1941) §§ 36.02, 36.14, 732.07; Idaho

true, and, since all courts of general jurisdiction are likewise courts of record, this test *alone* cannot be very significant. The fact that a probate court is not a court of record is a distinct indication that it is regarded as inferior.

Even though a probate court be termed a court of general or coordinate jurisdiction, in many cases appeals from it are taken to the courts of general jurisdiction and heard *de novo*. Behind this plan of procedure on appeal lies a mistrust in probate courts, at least in contentious matters.¹⁴¹ In relation to the appellate court in this instance, the probate court is an inferior court.¹⁴² And, even though the appeal is not heard *de novo*, the inferiority, though not so pronounced, still exists.

Another test to determine the status of a probate court is the extent to which jurisdiction has been conferred upon it in probate matters. As has been seen, the jurisdiction of the ecclesiastical courts was to probate wills, grant letters and entertain suits for legacies; but the jurisdiction of probate courts in America has not been so narrow. Probate courts usually have power to hear and determine issues on disputed claims, accountings, legacies, the sale of land to pay debts,

Const., art. 5, § 21; Ill. Const., art. 6, § 18; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 37, §§ 171, 299; Ind. Stat. (Burns, 1933) §§ 4-324, 4-2902, 4-3002; Iowa Code (1939) § 10761; Kan. Const., art. 3, § 8; Kan. Gen. Stat. (Supp. 1943) § 59-301; La. Const., art. 7, § 35; Me. Rev. Stat. (1930) c. 75, § 1; Md. Const., art. 4, § 1; Mass. Ann. Laws (1932) c. 215, § 1; Mich. Stat. Ann. (1943) § 27.3178(26); Minn. Const., art. 6, § 7; Mo. Const., art. 6, § 34; Mo. Rev. Stat. Ann. (1942) § 1990; Mont. Const., art. 8, § 25; Neb. Const., art. 5, § 16; Nev. Const., art. 6, § 8; Nev. Comp. Laws (1929) § 8403; N. H. Rev. Laws (1942) c. 346, § 1; N. J. Rev. Stat. (1937) § 2: 7-1; N. M. Const., art. 6, § 23; N. Y. Judiciary Law, art. 2, § 2; N. D. Comp. Laws (1913) § 8514; Ohio Const., art. 4, § 7; Okla. Const., art. 7, § 11; Ore. Const., art. 7, § 1; Pa. Stat. Ann. (Purdon, 1930) t. 20, §§ 2081, 2082, 2083, 2085; S. C. Code (1942) § 206; S. D. Const. art. 5, § 20; Tex. Const., art. 5, § 15; Utah Const., art. 8, § 17; Vt. Pub. Laws (1933) § 2719; Wash. Const., art. 4, § 11; W. Va. Const., art. 8, § 24; Wis. Stat. (1943) § 253.08.

¹⁴¹ See POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 311.

¹⁴² "All courts from which an appeal lies are inferior courts, in relation to the appellate court before which their judgment may be carried; but they are not, therefore, inferior courts, in the technical sense of those words." Chief Justice Marshall in *Kempe's Lessee v. Kennedy*, 5 Cranch (9 U. S.) 173 at 185 (1809).

partition of land, and a multitude of matters relating to the management of the estate. However, in some states resort must be had to the court of general jurisdiction for the enforcement of claims, for authority to sell land for the payment of debts or legacies, or for partition of lands. To the extent that its jurisdiction is incomplete and resort must be had to other courts, the probate court remains, in a sense, inferior.

Furthermore, the functions of probate courts have frequently been combined with certain minor jurisdictions in civil and criminal matters such as is exercised by county courts.¹⁴³ At the same time, the qualifications of judges presiding over such combined courts have frequently coincided with those required of judges of such inferior courts. A degradation of the probate court has resulted rather than an elevation of the inferior court with which it was combined.

Finally the caliber of judicial personnel has not been unrelated to the organization of courts and the respect which we have for them. A large portion of probate business in England receives the attention of the chancellor, the vice-chancellors and judges of the common-law courts, each of them eminently qualified for these tasks. In vesting all probate jurisdiction in one court in America, we have lost sight of the qualifications and ability possessed by English judges who have presided over probate matters. The qualifications for the office of judge of county and other similar courts of an inferior status in this country have been notoriously low; and qualifications for the office of probate judge in a large number of states are not much higher. If a lay judge is allowed to preside over an inferior court, appeals with a trial *de novo* are likely to be the answer to objections against lay personnel. Inefficiency and loss of prestige are the prices paid for such a system. Administrative ability and a specialized legal knowledge on the part of modern probate judges are

¹⁴³ POUND, ORGANIZATION OF COURTS (1940) 137, 180-181.

indispensable qualifications necessary to bring the American probate courts to a position fully equal to that of our courts of general jurisdiction.¹⁴⁴

C. GENERAL SURVEY OF AMERICAN PROBATE COURTS

No single formula is adequate to describe the present-day organization of probate courts in America. Furthermore, a single characterization of the probate court system of a given state would be an inaccurate description in a number of instances. But, despite an inability to generalize broadly, some useful classifications are possible; and from these classifications, some conclusions may be drawn with respect to the status, the powers, and other incidents that an ideal probate court should possess.

It is the purpose of this study to consider the present-day probate court or courts of each state and appraise them in terms of their relation to the court organization of that state. In making the classification that is to follow it is obviously impossible to appraise all probate courts on the basis of all the tests outlined above. Some one test alone must be used as a yard stick. Most probate courts are now courts of record;¹⁴⁵ and in a substantial number of states there is the same presumption of jurisdiction in favor of probate proceedings as is made in favor of courts of general jurisdiction.¹⁴⁶ If appeals from the probate court are taken to the court of general jurisdiction, the former certainly occupies an inferior position in relation to the latter; but if appeals lie to the same tribunal as do appeals from the court of general jurisdiction, then the two courts occupy coordinate positions. It is believed that this one factor of the court to which an appeal lies from a probate court is the most significant criterion in determining

¹⁴⁴ See VII and VIII, *infra*.

¹⁴⁵ See note 140, *supra*.

¹⁴⁶ See notes 137 and 138, *supra*.

the position or status to be ascribed to the latter. Consequently this one test is employed to the exclusion of all others in the analysis which follows.

Without attempting to trace the history or development of probate courts in any state, it may be said generally (and perhaps none too accurately) that probate courts exist in four different forms in the United States today. *First*, the most numerous group of states has separate courts, but with definitely inferior attributes in the local hierarchy of courts. This form of court exists in twenty-three jurisdictions and also has some kind of partial existence in ten other jurisdictions. *Second*, there is the system typified by California, where the court of general jurisdiction embodies both the trial court and the probate court; in other words, there is combined in one judge and one court the two functions of presiding over the ordinary trial court of general jurisdiction and also of supervising the administration of probate matters. This unified system exists in nine states and prevails in part in seven others. *Third*, there is the somewhat less numerous group of states in which there exist separate probate courts, without the inferior status of those mentioned in the first category, but having a place in the local court system more or less coordinate with the court of general jurisdiction. Appeals from their judgments are taken to the same courts and in the same manner as are appeals from courts of general jurisdiction. This form of court prevails in five states, and also has a partial existence in six others. *Fourth*, there are a few states in which probate matters are or may be committed to the jurisdiction of chancery—a legacy of the former English practice.

These variations within these four categories are sufficient to indicate the impossibility of generalizing and, also, to warrant the observation that our present product of probate courts is the result of additions and subtractions, impacts and influences, of each generation. Many of these changes have been

wrought in the interest of improving the efficiency and operation of probate courts; others have been made in the interests of economy or for the avowed purposes of bringing the probate court closer to the people and thus making it more democratic; or to make it available at all times. All of these may seem worthy objectives in themselves, and they should be so considered as long as they are not made at the expense of efficiency and simplicity in the administration of estates.

1. *Separate probate courts with inferior status*

In about two-thirds of the states the probate court is a separate court but relegated to an inferior position in the judicial organization of those states. As already indicated, the separate probate court was an early institution in America. The specialized nature of probate proceedings readily justified its separability. Furthermore, while it may have been agreed that the transmission of property from one generation to another required some judicial supervision, yet the process of effecting its transmission was so close and personal to the parties concerned that some court with less of the technical procedure employed in trial courts—a court which was open at all times¹⁴⁷ and where the parties interested could go at any time and discuss their affairs in an informal atmosphere¹⁴⁸—seemed a necessary part of every community. The separate probate court in every county answered these requirements.¹⁴⁹

But with this separate court in every county also came in most instances a relaxation of the qualifications of the probate judge. This suggested the necessity of closer scrutiny and supervision over his judicial acts when dispute or contest arose. The supervision of uncontested matters by a probate judge

¹⁴⁷ Statutes in nearly all states provide that the probate court shall be open at all times.

¹⁴⁸ POUND, ORGANIZATION OF COURTS (1940) 262.

¹⁴⁹ For a summary of this development see POUND, ORGANIZATION OF COURTS (1940) 136-137, 250.

without legal training or judicial experience, but with rights secured by an appeal, usually in the form of a trial *de novo* before a court presided over by a judge adequately trained, became the established practice.¹⁵⁰ This procedure of a trial *de novo* on appeal from probate courts amounts to nothing less than a method of control over their proceedings without the supervision of a competent judge in the first instance. Thus created as inferior tribunals, there is little incentive to improve their judicial position. A trial *de novo* in the court of general jurisdiction on appeal is thought to be cheaper than to have the affairs of the probate court directed by competent personnel in the first instance. Twenty-six states¹⁵¹ have created probate courts in this image. In seven others¹⁵² appeals lie

¹⁵⁰ POUND, ORGANIZATION OF COURTS (1940) 140, 250.

¹⁵¹ Colo. Stat. (1935) c. 46, § 168, c. 176, § 243; Conn. Gen. Stat. (1930) § 5624; Ga. Code Ann. (1936) § 6-501; Idaho Code (1932) § 11-406 (unless errors of law appear on face of the record); Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 487; Kan. Gen. Stat. (Supp. 1943) § 59-2408; Ky. Civ. Code (1938) § 726; Me. Rev. Stat. (1930) c. 75, §§ 32, 36; Mich. Stat. Ann. (1943) § 27.3178(42); Minn. Stat. (1941) § 525.72; Mo. Rev. Stat. Ann. (1942) § 291; Neb. Comp. Stat. (1929) § 30-1606; N. H. Rev. Laws (1942) c. 365, § 11; N. M. Stat. (1941) § 19-1001; N. D. Comp. Laws (1913) §§ 8616, 8620 (unless on question of law alone); Ohio Gen. Code (Page, 1937) §§ 12223-21, 12223-27 (if no record made of proceedings in probate court); Okla. Const., art. 7, § 16; Okla. Stat. (1941) t. 20, § 275; Ore. Comp. Laws (1940) § 10-810; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2005 (on appeal from register of wills to orphans' court); *In re Geho's Estate*, 33 Berks 43, aff'd. 340 Pa. 412, 17 A. (2d) 342 (1941); R. I. Gen. Laws (1938) c. 573, § 1; *McSoley v. Slepchow*, 54 R. I. 374, 173 A. 124 (1934); *Davis v. Higgins*, 59 R. I. 339, 195 A. 495 (1937); S. D. Code (1939) § 35.2111; Tenn. Code (Michie, 1938) § 9033; Tex. Rules Civ. Proc. (Supp. 1944) Rule 334; Vt. Pub. Laws (1933) § 3016 (amended by Vt. Laws, 1941, No. 42, p. 53); Va. Code (1942) § 5249; *Saunders v. Link*, 114 Va. 285, 76 S. E. 327 (1912) (appeal from clerk of circuit court); Wis. Stat. (1943) § 324.03 (on appeal to circuit court from courts in counties of less than 15,000 population).

In this study we have not attempted to study those statutes which provide for probate jurisdiction to be exercised by other courts in exceptional cases. See, for example, Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 208, providing for administration to be carried on in the county or circuit court in estates in which the probate judge is interested; and Mich. Stat. Ann. (1937) § 27.1204 providing for the probate in the circuit court in chancery of foreign wills not required to be probated in order to be effective in the foreign jurisdiction. Such jurisdiction is the exceptional, not the normal, one.

¹⁵² Ala. Code (1940) t. 7, §§ 783, 784; Del. Const., art. 4, §§ 33, 34; Del. Rev. Code (1935) §§ 4418, 4419 (on record if taken, otherwise *de novo*); Fla.

to the court of general jurisdiction upon the record made in the probate court. This may imply a little more confidence in the probate court. At least it eliminates the necessity of a complete rehearing, but does not eliminate the court of general jurisdiction as an intermediate court of appeal.

2. *Probate courts unified with courts of general jurisdiction*

Under the California Constitution of 1849¹⁵³ the exercise of probate jurisdiction was conferred upon county courts. There were separate county courts in each county, but the state was divided into districts with only one district judge for each district of several counties. It was found that many county judges did not have sufficient work to keep them busy at all times; and also that, when a district judge was needed in civil or criminal matters, he was frequently far away in another county and not readily accessible. It was observed that, frequently, large estates came under the jurisdiction of the county courts and required able and capable supervision. Simple calculations were sufficient to show that no substantial expense would be incurred if a separate judge were provided for each county and the jurisdiction of the county courts consolidated with that of the district courts. Accordingly, it was proposed in the Constitutional Convention of 1878-79 to consolidate these two courts and have a separate "superior court" and "superior judge" for each county. Judicial ability, accessibility, responsiveness to the local community, elimination of competition between the different counties in the same district as to the selection of the judge—all at no increased expense—were believed to be thus available, although

Stat. Ann. (1941) §§ 61.01-61.07, 732.18; N. J. Prerog. Ct. Rules (1941 revision) Rule 93 (but court in its discretion may permit testimony not previously available); N. C. Gen. Stat. (1943) §§ 1-274, 1-275; S. C. Code (1942) § 231; *Ex parte White*, 33 S. C. 442, 12 S. E. 5 (1890); *Sartor v. Fidelity & Deposit Co.*, 160 S. C. 390, 158 S. E. 819 (1931); W. Va. Code (1937) §§ 5763, 5764, 5765.

¹⁵³ Cal. Const. of 1849, art. 6, §§ 5, 6.

there was some dissent voiced to these alleged advantages. Nevertheless, after some debate,¹⁵⁴ this plan was embodied in the California Constitution of 1879¹⁵⁵ and has been in operation since that date. Thus the county courts were abolished and their jurisdiction transferred to the newly created superior courts—courts of general jurisdiction.

The same system had been inaugurated in Nevada some fifteen years earlier in the Constitution of 1864¹⁵⁶ and with hardly a dissenting voice. The arguments in favor of the plan were succinctly stated in the debates of the Nevada Constitutional Convention and are worth restating here:

“In the first place, under such a system, we have all the judicial business done in the county which could be done by the District Judge and by the County Judge of that county; that is to say, we have ample force on the bench, in each county, to discharge all the duties that could be discharged in that county by the District and County Judges, and we have those duties performed, too, more expeditiously, and more economically; and we, at the same time, obviate the necessity of an appeal from the County Judge, or, if you please, from the Justices of the Peace to the County Judge, and from the County Judge to the District Judge, and then again from the District Judge to the Supreme Court. We rid ourselves of all this delay and difficulty by adopting this resolution, and thus we avoid, as it were, two intermediate stumbling-blocks in the way of justice, wiping them out of our judicial system altogether. In each of those inferior courts, expenses are necessarily incurred, and time wasted by litigants, before they can reach the court of final resort.

“Not only that, Mr. Chairman, but if you adopt the system proposed, you dignify the character of your judiciary in the several counties, and secure the respect of litigants for the courts, to a degree which, I humbly submit, they do not always challenge at the present time. Further than that, you also

¹⁵⁴ 2 Debates and Proceedings of the Constitutional Convention of California, 1878-1879 (1881) pp. 972-976.

¹⁵⁵ Cal. Const., art. 6, § 5.

¹⁵⁶ Nev. Const. of 1864, art. 6, § 6.

secure the services on the bench, of men of ability—men in whom the community can confide. You get men whose qualifications are known, coming from the neighborhoods in which they are elected, and known to all the citizens within their counties, and you avoid the great struggle which, aside from political considerations, would always be sure to arise, to a certain extent, under the old system of judicial districts comprising several counties in each, between the different counties of those respective districts, where men would naturally be combatting and struggling over the question of which county should present the candidate for District Judge.”¹⁵⁷

Whether California was influenced by the reform in Nevada is not clear. At least no reference to the system already in operation in Nevada is to be found. From the discussions on this proposed system, it is probable that California was influenced solely by considerations peculiar to itself.¹⁵⁸

This plan of conferring probate jurisdiction upon the courts of general jurisdiction was widely copied from California, especially in the western states. In addition to California and Nevada, it has been adopted in Montana,¹⁵⁹ Utah,¹⁶⁰ Washington,¹⁶¹ Wyoming,¹⁶² and Arizona.¹⁶³ But this plan is not confined to the west. It also exists in Iowa,¹⁶⁴ Indiana,¹⁶⁵ and Louisiana.¹⁶⁶ Moreover, this system may be said to prevail in Alabama¹⁶⁷ and New Mexico¹⁶⁸ insofar as an administration

¹⁵⁷ Nevada Constitutional Debates and Proceedings, 1864 (1866) p. 233.

¹⁵⁸ 2 Debates and Proceedings of the Constitutional Convention of California, 1878-1879 (1881) pp. 972-976.

¹⁵⁹ Mont. Const., art. 8, § 11.

¹⁶⁰ Utah Const., art. 24, § 9.

¹⁶¹ Wash. Const., art. 27, § 10.

¹⁶² Wyo. Const., art. 5, § 10.

¹⁶³ Ariz. Const., art. 6, § 6. In Arizona and California there is a separate court and judge for each county. Other states in which probate matters are handled by courts of general jurisdiction, are divided into districts with one judge presiding over courts in several counties except in the most populous places.

¹⁶⁴ Iowa Code (1939) §§ 10763, 11819.

¹⁶⁵ Ind. Stat. (Burns, 1933) § 4-303.

¹⁶⁶ La. Const., art. 7, § 35.

¹⁶⁷ Ala. Code (1940) t. 13, §§ 138-144.

¹⁶⁸ N. M. Stat. (1941) §§ 16-312, 16-419, 16-420.

proceeding may be removed to the circuit or district courts of those states. Insofar as a probate proceeding is under the supervision of the circuit courts (or the hustings courts or law and chancery courts in certain cities) in Virginia¹⁶⁹ or of the superior courts in North Carolina,¹⁷⁰ the same may be said of these courts. In a certain sense this is also true in those counties of Oregon having a population of over 30,000 in which the probate court has been made a division of the circuit court.¹⁷¹ In the three counties of Ohio in which the probate court has been "consolidated" with the common pleas courts,¹⁷² there may be an appearance of a unified court, but this is not so. The probate courts there have neither been extinguished nor merged with the common pleas courts. Rather there has been a union of the personnel of the judge presiding over those two courts.¹⁷³ Indeed a decision of the probate court may be reviewed *de novo* on appeal before the same judge sitting as a common pleas judge.¹⁷⁴

The old county courts in California in exercising their probate jurisdiction had been regarded as courts of limited and special jurisdiction.¹⁷⁵ What was the nature of this fusion with the court of general jurisdiction? It has been described thus: "It may be said that the probate court is gone, but that the probate jurisdiction remains. And that jurisdiction is now vested in the same court that exercises jurisdiction in cases of law and equity."¹⁷⁶ In exercising that jurisdiction, however, the court of general jurisdiction does not have general powers, but only those powers formerly exercised by courts of probate. Except for the power to exercise equitable juris-

¹⁶⁹ Va. Code (1942) §§ 5247, 5360, 5910, 5914, 5920, 5935, 5947.

¹⁷⁰ N. C. Gen. Stat. (1943) §§ 28-30, 33-31.

¹⁷¹ Ore. Comp. Laws (1940) §§ 13-206, 13-207, 13-209, 93-310.

¹⁷² Ohio Gen. Code (Page, 1937) §§ 10501-47, 10501-50.

¹⁷³ State ex rel. Sattler v. Cahill, 122 Ohio St. 354, 171 N. E. 595 (1930).

¹⁷⁴ Ohio Gen. Code (Page, Supp. 1943) § 10501-56.

¹⁷⁵ Pryor v. Downey, 50 Cal. 388 at 400 (1875).

¹⁷⁶ In re Estate of Davis, 136 Cal. 590 at 597, 69 P. 412 (1902).

diction as an incident of its probate functions, the superior court in probate is entirely distinct from the same court in a civil or criminal proceeding. It remains essentially a probate court and must confine its movements to probate matters. A remedy sought in the wrong side of the court may be as fatal as though sought in the wrong court.¹⁷⁷ This same conception of divisible jurisdiction prevails also in Montana¹⁷⁸ and Wyoming.¹⁷⁹

The Constitution of Washington, not unlike that of California, provides that "the superior court shall have original jurisdiction in all cases in equity and in all cases at law . . . and all criminal cases . . . of all matters of probate."¹⁸⁰ But it is said that "the Constitution does not make the superior courts probate courts. On the contrary it vests the superior courts with jurisdiction of 'all matters of probate'; hence the court is not shorn of its general powers simply because the cause before it may be one which was cognizable formerly in

¹⁷⁷ *In re Estate of Davis*, 136 Cal. 590, 69 P. 412 (1902); *In the Matter of Estate of McLellan*, 8 Cal. (2d) 49, 63 P. (2d) 1120 (1936); *Fisher v. Superior Court*, 23 Cal. App. (2d) 528, 73 P. (2d) 892 (1937). In the last case cited, a proceeding to contest a will after probate was declared ineffectual because filed in the general, rather than the probate, jurisdiction of the superior court, as required by the California probate code. This means that only probate matters must be tried on the probate side and non-probate matters on the non-probate side of the court. Three cases may seem to violate this principle: *In re Thompson's Estate*, 101 Cal. 349, 35 P. 991 (1894); *In re Clary's Estate*, 112 Cal. 292, 44 P. 569 (1896); and *In re Ricconi's Estate*, 185 Cal. 458, 197 P. 97 (1921). In each of these cases, however, relief essentially equitable in nature was sought on the probate side of the court, whereas it should have been sought on the equity side of the court. The estate of a deceased person was involved in each case, which probably accounts for the mistaken choice of forum. Nevertheless in each instance the parties submitted and the matter was tried as an equitable matter and the adjudication upheld. The pleadings also supported the equity jurisdiction which justified the court in ignoring the fact that the remedy was formally sought under the probate jurisdiction. If the parties had objected before trial, however, a different result might have been obtained. See *Hampshire v. Woolley*, 72 Utah 106, 269 P. 135 (1928) as an example of this procedure.

¹⁷⁸ *In re Sprigg's Estate*, 68 Mont. 92, 216 P. 1108 (1923); *State ex rel. Hahn v. District Court*, 83 Mont. 400, 272 P. 525 (1928).

¹⁷⁹ *Church v. Quiner*, 31 Wyo. 222, 224 P. 1073 (1924).

¹⁸⁰ Wash. Const., art. 4, § 6.

a court of probate.”¹⁸¹ It has been repeatedly held that the superior court sitting in probate matters loses none of its powers as a court of general jurisdiction.¹⁸² It is said that “the constitution simply throws probate matters into the aggregate jurisdiction of superior courts as courts of general jurisdiction, to be exercised along with their other jurisdictional powers, legal and equitable, and as a part of those general powers.”¹⁸³ This unitary notion of the superior court has likewise been followed in Oregon,¹⁸⁴ Utah,¹⁸⁵ and Arizona.¹⁸⁶

¹⁸¹ *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643 at 646-647, 72 P. 502 (1903).

¹⁸² *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 P. 147 (1913); *In re Martin's Estate*, 82 Wash. 226, 144 P. 42 (1914); *State ex rel. Neal v. Kauffman*, 86 Wash. 172, 149 P. 656 (1915); *In re Wren's Estate*, 163 Wash. 65, 299 P. 972 (1931); *In re Kelley*, 193 Wash. 109, 74 P. (2d) 904 (1938).

¹⁸³ *State ex rel. Keasal v. Superior Court*, 76 Wash. 291 at 298, 136 P. 147 (1913).

¹⁸⁴ *In re Will of Pittock*, 102 Ore. 159, 199 P. 633, 202 P. 216 (1921); *In re Faling's Estate*, 113 Ore. 6, 228 P. 821, 231 P. 148 (1924). This is confined to those counties in Oregon now having a population in excess of 30,000 and in which probate jurisdiction is vested in the circuit courts, department of probate. In the first case cited the court construed a will and decided a will contest in the same proceeding. In the second case it allowed attorneys' fees in connection with a will contest, which could not have been done had the court had jurisdiction solely over probate matters. The court said that its mode of proceeding was in the nature of a suit in equity. Completeness of administration in one proceeding was the objective.

¹⁸⁵ In Utah it is said: “We therefore have no courts which are known as probate courts, or as law courts, or as equity courts; but we have courts possessed of general original jurisdiction, which are known as district courts. The district courts of this state, therefore, administer the estates of decedents as a part of their original jurisdiction, the same as they hear and enter judgments on promissory notes, or enter decrees in equity, foreclosing mortgages or quieting titles.” *Weyant v. Utah Savings & Trust Co.*, 54 Utah 181 at 204, 182 P. 189 (1919). Other cases implying or holding that the court's jurisdiction is independent of the nature of the subject matter are: *In re Tripp's Estate*, 51 Utah 359 at 363, 170 P. 975 (1918); *In re Reiser's Estate*, 57 Utah 434 at 440, 195 P. 317 (1921); *In re Agee's Estate*, 69 Utah 130, 252 P. 891 (1927); *In re Thompson's Estate*, 72 Utah 17 at 32-35, 269 P. 103 (1927). But see *Hampshire v. Woolley*, 72 Utah 106, 269 P. 135 (1928) where a writ of prohibition was granted to restrain exercise of non-probate jurisdiction by district court sitting in probate; *In re Rogers' Estate*, 75 Utah 290, 284 P. 992 (1930) where the pleadings were held insufficient to invoke the non-probate jurisdiction of the court sitting in probate.

In *In re McLaren's Estate*, 99 Utah 340 at 346-47, 106 P. (2d) 766 (1940) the question of the power of a district court sitting in probate to pass upon a non-probate matter was held waived by the parties. The court said that the

This conception of jurisdiction has several noteworthy consequences. For many purposes the line of demarcation between the equity and probate jurisdiction of the court need not be observed. In either case it is in the same court and before the same judge. Thus the court of general jurisdiction may do many things in connection with a probate proceeding that would otherwise have required a separate action or proceeding addressed to its non-probate side. It can construe a will¹⁸⁷ or make partition of property,¹⁸⁸ even though not essential to the exercise of its probate jurisdiction. But, where the matter is one in which there is a right to trial by jury, it must not be impaired by calling it a probate matter—in which there is ordinarily no right to a jury trial.¹⁸⁹ The fusion of probate with law and equity cannot so easily abolish their essential differences. Furthermore courts must be ever alert not to proceed by citation or publication against a person in an alleged probate proceeding—a proceeding in rem—and end up by a judgment or decree in personam, for such may violate the requirement of due process.¹⁹⁰

proper procedure "when a contested question arises in a probate proceeding involving the determination of disputed facts, is to strike the matters from the probate calendar and transfer it to the calendar of civil cases to be heard and determined as a contested civil matter. . . . The matter of transferring a cause from the probate calendar to a civil calendar in the same court is not a matter of jurisdiction but one of procedure."

¹⁸⁶ *Estate of Hannerkam*, 51 Ariz. 447, 77 P. (2d) 814 (1938) in which the district court in an action in which administratrix was substituted as party plaintiff approved a settlement of the action, which it could only do under its probate power.

¹⁸⁷ *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643 at 646-647, 72 P. 502 (1903).

¹⁸⁸ *In re Wren's Estate*, 163 Wash. 65, 299 P. 972 (1931).

¹⁸⁹ *Id.*

¹⁹⁰ The importance of keeping this distinction clear is well brought out in *In re McLaren's Estate*, 99 Utah 340 at 354-355, 106 P. (2d) 766 (1940) in which the court said: "But again, warning should be sounded regarding the situation where a civil case is tried as a probate matter and probate matter tried as a civil case when they are respectively purely matters cognizable only as civil and as probate. It is one thing to determine a civil matter as a probate matter or a probate matter as a civil case and quite another thing to try a probate matter as a probate matter and a civil case as a civil case, although they may be addressed

3. *Separate probate courts but coordinate with those of general jurisdiction*

Several developments in Massachusetts have resulted in a profound change in the essential character of the probate court in that state. By a statute in 1862¹⁹¹ the probate courts were made courts of record. In 1891 another statute¹⁹² made them "courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction." The method of accomplishing this was not left to a mere designation. The statute indicates how this is to be done, viz., by a presumption "in favor of the proceedings of the probate courts as would be made in favor of the proceedings of the other courts of superior and general jurisdiction." Both of these changes were in the right direction, but still the procedure on appeal was left untouched. Trials *de novo* on appeal remained before one justice of the Supreme Judicial Court under whose direction there could even be a trial by jury. Final appeal from the decision of the single justice was heard before the full Supreme Judicial Court sitting as the Supreme Court of Probate.¹⁹³ Finally in 1920 appeals were taken directly to the full bench of the Supreme Judicial Court.¹⁹⁴ The hearing before the single justice was eliminated. And the appeal has been since treated as an appeal in a suit in equity under the

to the wrong divisions of the court. The first is a matter of substance; the second a matter of labels and ministerial adjustment. . . . The probate division by virtue of its jurisdiction of the estate and the heirs for general purposes of administration could not in probate proceedings wherein the party was served by the mailing to him of a probate notice of the contest, have given judgment against him in a matter essentially civil in its nature." See also *In re Martin's Estate*, 82 Wash. 226, 144 P. 42 (1914); and *In re Kelley*, 193 Wash. 109, 74 P. (2d) 904 (1938).

¹⁹¹ Mass. Acts and Resolves, 1862, c. 68, p. 56, now Mass. Ann. Laws (1932) c. 215, § 1.

¹⁹² Mass. Acts and Resolves, 1891, c. 415, § 4, now Mass. Ann. Laws (1932) c. 215, § 2; and see Commissioners' Report (Mass.) for Consolidating Public Statutes (1901) notes on c. 162, §§ 2, 8.

¹⁹³ NEWHALL, *SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS* (3d ed. 1937) § 250.

¹⁹⁴ Mass. Ann. Laws (1932) c. 215, § 9 et seq.

general equity jurisdiction.¹⁹⁵ Questions of fact as well as of law are considered with respect to the evidence given in the probate court.¹⁹⁶ Thus the procedure on an appeal from the probate court was substantially the same as from the superior courts, i.e., on the record made in the court below and without a trial *de novo*.¹⁹⁷ This last step was the most fruitful in elevating probate courts to a stature fully coordinate with that of the superior courts in Massachusetts.

Several other states have felt that the character of probate proceedings was such as not only to justify separate probate courts, but also that their function was of such moment that they be given the same standing as courts of general jurisdiction. Thus in Pennsylvania the orphans' courts are courts of record;¹⁹⁸ and their proceedings are entitled to the same recognition and presumptions of validity as those of common pleas courts;¹⁹⁹ and appeals are prosecuted to the superior or supreme court in the same manner as are appeals from the common pleas courts.²⁰⁰

In New York substantially the same comparison may be made. The surrogates' courts are courts of record,²⁰¹ and their proceedings and decrees are entitled to a presumption of regularity and validity.²⁰² Appeals lie to the Appellate Division of the Supreme Court, in the same manner as from the Supreme Court.²⁰³

A similar summary may be made in Maryland. The orphans' court is a court of record;²⁰⁴ appeals are taken di-

¹⁹⁵ *Ibid.*

¹⁹⁶ *Id.* c. 215, § 12.

¹⁹⁷ NEWHALL, *SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS* (3d ed. 1937) § 250, note 4.

¹⁹⁸ Pa. Stat. Ann. (Purdon, 1930) t. 20, §§ 2081, 2082, 2083, 2085.

¹⁹⁹ Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2085.

²⁰⁰ Pa. Stat. Ann. (Purdon, 1930) t. 17, §§ 181, 185; t. 12, §§ 1091, 1107.

²⁰¹ N. Y. Judiciary Law, art. 2, § 2.

²⁰² N. Y. Surr. Ct. Act, § 43. See also *O'Conner v. Huggins*, 113 N. Y. 511 (1889).

²⁰³ N. Y. Surr. Ct. Act, § 288.

²⁰⁴ Md. Const., art. 4, § 1.

rectly to the Court of Appeals of Maryland where they are heard on the record made in the orphans' court.²⁰⁵

The administration of probate matters in New Jersey by the surrogate's court, the orphans' court, and the prerogative court has already been detailed. Appeals from orphans' courts lie to the prerogative court and from the latter to the court of errors and appeals.²⁰⁶ The common pleas courts are the courts of general jurisdiction and appeals from them lie to the supreme court and from the latter to the court of errors and appeals.²⁰⁷ In this respect, the orphans' courts may be termed coordinate with the common pleas courts.

The probate courts of Ohio, like the common pleas courts, are courts of record,²⁰⁸ and are accorded a presumption in favor of their proceedings.²⁰⁹ Appeals lie directly to the courts of appeals in the same manner as do appeals from the common pleas courts,²¹⁰ unless no record was made of the proceeding in the probate court, in which case appeals are heard *de novo* in the common pleas court²¹¹ from which an appeal will then lie to the court of appeals. To the extent that appeals lie and are taken to the courts of appeal directly from probate courts, the latter are coordinate with the common pleas courts; but, to the extent that no record is made in the probate court and appeals are taken to the common pleas courts with a trial *de novo*, the probate courts are definitely of an inferior status.

In Wisconsin probate matters come under the jurisdiction of the county courts,²¹² which also handle a limited amount of civil and criminal matters in some counties under special legis-

²⁰⁵ Md. Code (1939) art. 5, §§ 64, 66.

²⁰⁶ N. J. Rev. Stat. (1937) § 2:30-16.

²⁰⁷ N. J. Rev. Stat. (1937) §§ 2:27-355, 2:27-350.

²⁰⁸ Ohio Const., art. 4, § 7.

²⁰⁹ *Shroyer v. Richmond*, 16 Ohio St. 455 (1866).

²¹⁰ Ohio Gen. Code (Page, Supp. 1943) § 10501-56.

²¹¹ *Ibid.*

²¹² Wis Stat. (1943) § 253.01.

lation.²¹³ These courts are courts of record.²¹⁴ In counties having a population of 14,000 or more the county judge must be a member of the bar or have previously occupied the office of probate judge.²¹⁵ In other counties no such qualifications are required. A layman may be county judge.²¹⁶ Appeals from counties having a population of more than 15,000 lie to the Supreme Court;²¹⁷ in the remaining twelve counties appeals lie to the circuit court with a trial de novo.²¹⁸ In the former case, the hearing on appeal is on the record of the proceedings in the county court, and otherwise has the same procedure as do appeals from circuit courts.²¹⁹ Thus in counties having a population of more than 15,000 the county courts occupy a position coordinate with the circuit courts in the matter of appeals. In other counties, their position may only be described as inferior.

In Indiana administration of decedents' estates is had in the circuit courts by circuit judges for the most part,²²⁰ similar to the California system. In Marion²²¹ and Vanderburgh²²² counties, however, separate probate courts have been created and designated as courts of record.²²³ Appeals from the circuit court in probate matters lie to the supreme court or one of the courts of appeals.²²⁴ As might be expected the appeal is not heard de novo but on the record, since the matter originally was heard by a circuit judge. Similarly appeals from these

²¹³ Wis. Stat. (1943) App. p. 8.

²¹⁴ Wis. Stat. (1943) § 253.08.

²¹⁵ Wis. Stat. (1943) § 253.02.

²¹⁶ Wis. Stat. (1943) § 253.02, except in counties where civil or criminal jurisdiction has been conferred upon county courts.

²¹⁷ Wis. Stat. (1943) § 324.01.

²¹⁸ Ibid.

²¹⁹ Wis. Stat. (1943) § 324.04.

²²⁰ Ind. Stat. (Burns, 1933) § 4-303.

²²¹ Ind. Stat. (Burns, 1933) § 4-2901.

²²² Ind. Stat. (Burns, 1933) § 4-3001.

²²³ Ind. Stat. (Burns, 1933) §§ 4-2902, 4-3002.

²²⁴ Ind. Stat. (Burns, 1933) §§ 4-214, 6-2001.

two separate probate courts lie to the supreme court or a court of appeals.²²⁵ Thus these two probate courts may be said to have the same standing as circuit courts in Indiana.

In the District of Columbia there is a separate probate term each year of the United States District Court there.²²⁶ That term of court is presided over by the district judge. Nevertheless there is a separate probate court, with a union of personnel.²²⁷ Appeals are taken to the United States Court of Appeals for the District of Columbia in the same manner as appeals from the district court.²²⁸ Hence the probate court for the District of Columbia is fully coordinate with the district court there.

In Tennessee the chancery courts have concurrent jurisdiction with the county court to appoint an administrator six months after the decedent's death.²²⁹ The county courts have concurrent jurisdiction with the chancery and circuit courts in proceedings to sell real estate of decedents, and for distribution and partition.²³⁰ Appeals from the county courts lie to the circuit courts with a trial *de novo* ²³¹ except that, if the jurisdiction of the county court in the matter appealed from is concurrent with that of chancery and circuit courts, an appeal lies directly to the court of appeals or supreme court.²³² Insofar as appeals from the county court lie directly to the court of appeals or supreme court, the former may be termed coordinate with the courts of general jurisdiction in the present classification.

A Vermont statute provides that appeals from probate courts lie directly to the supreme court on questions of law,²³³ but

²²⁵ Ind. Stat. (Burns, 1933) §§ 2-3218, 2-3222, 2-3223.

²²⁶ D. C. Code (1940) § 11-501.

²²⁷ Ibid.

²²⁸ D. C. Code (1940) § 17-101.

²²⁹ Tenn. Code (Michie, 1938) § 10382.

²³⁰ Tenn. Code (Michie, 1938) §§ 8263, 10326, 10380.

²³¹ Tenn. Code (Michie, 1938) §§ 9028, 9033, 9060.

²³² Tenn. Code (Michie, 1938) §§ 9029, 9059.

²³³ Vt. Pub. Laws (1933) § 3001.

otherwise to the county courts.²³⁴ To the extent that appeals lie directly to the supreme court, the probate courts of Vermont are coordinate with the courts of general jurisdiction.

In Illinois, appeals from a final order of the probate court in a proceeding for the sale of real estate lie to the appellate or supreme court of that state,²³⁵ rather than to the circuit courts. In this one instance, probate courts in Illinois are clearly coordinate with those of general jurisdiction.

In each of the first five states discussed here, probate proceedings are believed to be of such a character and volume as to justify a separate probate court substantially on a par with those of general jurisdiction. Certainly in Massachusetts, New York and Pennsylvania, and in certain communities of New Jersey, Maryland and Ohio, the population and amount of probate business is large enough to warrant the establishment of separate courts.

4. *Probate matters handled in chancery*

In most states the aid of chancery may be sought only when the power of the probate court is insufficient for the desired end. In Alabama any person interested in an estate may, at any time prior to final settlement, take the proceeding into chancery. Even under the early decisions of that state, no reason need be given. It was a matter of absolute right.²³⁶ This was probably a broader jurisdiction than was exercised by English chancery courts over decedents' estates. In 1915 this was embodied in a statute there.²³⁷ Under the present practice an estate may be removed either to the circuit court²³⁸ or to chancery.²³⁹ In effect then, there is concurrent juris-

²³⁴ Vt. Pub. Laws (1933) § 3002.

²³⁵ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 486.

²³⁶ See SIMS, CHANCERY PLEADING AND PRACTICE IN ALABAMA (1909) § 658 and cases there cited.

²³⁷ Ala. Acts, 1915, p. 738.

²³⁸ Ala. Code (1940) t. 13, §§ 138, 139.

²³⁹ Ala. Const., art. 6, § 149.

diction in the probate, circuit and chancery courts to administer estates in Alabama.

In Mississippi jurisdiction over probate matters in the county courts was abandoned in 1890 and conferred entirely upon the chancery courts.²⁴⁰ This put probate jurisdiction in a court which had exercised it upon special occasions previously and which had ample equipment and personnel capable of the new task assigned to it. Furthermore, it eliminated any question as to the amount of equity powers possessed by the probate court or whether the circumstances of a particular administration proceeding warranted the intervention of chancery.²⁴¹

Prior to 1939 there were separate probate courts in Arkansas. By a constitutional amendment, effective January 1, 1939, the judges of the chancery courts have been given the added duty of presiding over the probate courts.²⁴² It is said that the probate courts have not lost their identity by such consolidation, but that they remain probate courts in chancery.²⁴³ However, the effect of transferring this function to the judges of the chancery courts cannot be merely formal; it will likely import into probate proceedings some of the equitable practices and doctrines known and practiced in courts of chancery.

In addition to these three states where chancery has a hand regularly in the administration of probate matters, there are numerous situations that arise in the administration of estates where it is thought that the machinery of probate courts is inadequate to deal with the problem; and that because of special circumstances, the invocation of equity jurisdiction is justified. This is an established practice in most states at the present time. The occasions for this special jurisdiction of

²⁴⁰ Miss. Const., art. 6, § 159.

²⁴¹ Some idea of the extent as to the uncertainty of equity powers possessed by probate courts is described in POUND, ORGANIZATION OF COURTS (1940) 140.

²⁴² Ark. Const., Amend. 24; Ark. Acts, 1939, Act 3, p. 6.

²⁴³ *Lewis v. Smith*, 198 Ark. 244, 129 S. W. (2d) 229 (1939).

equity over the administration of estates are not within the primary purpose of this study and cannot, therefore, be treated here.²⁴⁴

IV. COURT ORGANIZATION IN RELATION TO CONTENTIOUS AND NONCONTENTIOUS BUSINESS

In any matured system of law the administration of a decedent's estate may involve both contentious and noncontentious matters. Thus, first, it is entirely possible that all interested parties are agreed that a will is valid, or that there is no will and that the property should be distributed to creditors and to devisees or heirs on some fair basis. Or, second, there may be a dispute as to whether the will propounded is valid; there may be adverse claims to the office of executor or administrator; a creditor's claim may be disputed by an executor or administrator; a dispute may arise as to priorities in the payment of legacies when the estate is insufficient to satisfy all. As to this second type of administrative matter, it is difficult to escape the conclusion that it involves the judicial determination of controversies of the same general character as are handled by the civil side of a trial court of general jurisdiction. It calls for the same capacity to supervise impartially the trial of contested issues, the same ability to determine accurately the application of complicated rules of law to the transmission of property interests. In short, it would seem that the contentious business of the court should be handled by a judge with as high qualifications as the trial judge.

As to noncontentious matters, the situation may be different. Here it is conceivable that the estate could be distributed without any judicial intervention at all. Indeed, the Roman law system, with its conception of universal succession,²⁴⁵ accom-

²⁴⁴ As to the jurisdiction of equity to administer estates, see 1 WOERNER, ADMINISTRATION (3d ed. 1923) §. 156; "Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees," 48 YALE L. J. 1273 (1939).

²⁴⁵ BUCKLAND, TEXTBOOK OF ROMAN LAW (2d ed. 1932) 282 ff.

plished just that. And the modern tendency of legislation in the United States to dispense entirely with administration in the case of small estates is to the same effect.²⁴⁶ Nevertheless, there are many cases where some judicial action is desirable even though there are no controversies among the interested parties. This becomes particularly important in view of the current trend, elsewhere noted,²⁴⁷ to provide that the probate court distribute land by its decree. In spite of the lack of disagreement among persons interested in the estate, they may well need the aid of a court to determine what is a just basis of distribution; they may wish to distribute in such a way as to avoid disputes in the future; and, to further that end, they may desire to have an official record of the distribution which has been made. Thus, the noncontentious business of the court is an important function of the judicial organization. No statistics are required to justify the observation that the vast majority of smaller estates is handled by American probate courts without any controversies whatever. Administration in court is then desired solely for the purpose of having the property of the decedent disposed of in an orderly way.

As to the noncontentious business of the court, it is not so clear that an efficient trial judge is needed. Certainly, by hypothesis, there are no disputed issues to try. And much of the noncontentious business is mere routine which can well be handled by a superior type of clerk or probate register. Of course, insofar as the action of the court in noncontentious business involves the avoiding of potential disputes, it would seem to call for the same understanding of the intricacies of property law as is necessary when there is an actual dispute.

It is the purpose of the discussion which follows to consider how far the court organization in typical jurisdictions is adapted

²⁴⁶ See ATKINSON, *WILLS* (1937) 529-540.

²⁴⁷ See Subdivision V of this monograph.

to a differentiation between contentious and noncontentious business. The sharp differentiation in English law will first be pointed out. Then the probate judicial organizations of various typical states will be considered in connection with the questions: How far have they retained the distinction between contentious and noncontentious business emphasized in the English system which served as their model? How far have they developed a basis of differentiation unlike the English model? The answer to these questions will involve some consideration of the matter of will contests and of appeals by trial *de novo* in the court of general jurisdiction. But it must be pointed out that the handling of contentious and noncontentious business is under consideration here only as a matter of court organization and not as a matter of probate procedure.

In the English ecclesiastical courts, the line between contentious and noncontentious business was pretty much the line between probate in common and in solemn form, heretofore referred to. If a will were probated in common form there was no notice to interested parties; proof generally consisted merely in the executor taking oath that he believed the instrument presented was duly executed by a competent testator. If a caveat were filed by the next of kin, proof in solemn form then had to be made; interested parties were cited; and the attesting witnesses testified as to the execution of the will. The hearing was before the ordinary. Contested issues as to the account of the personal representative and as to a legatee's right to his legacy could also be tried in the ecclesiastical courts. As to the real estate, noncontentious business would seem to have been handled without any judicial assistance whatever; and contentious matters were dealt with either in the courts of law or of equity, depending upon the nature of the controversy.

Doubtless the distinction between the probate of a will in solemn form and in common form was not developed primarily

for the purpose of judicial efficiency. One reason for it must have been the belief that the decedent's estate required management from the moment of his death; and that to wait for notice before the appointment of an executor or administrator would result in a wasting of the property of the decedent. This idea is voiced in the *Report of the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts*, which appeared in 1832.²⁴⁸ Concluding that the probate in common form should be retained, the report states:

"For Probate so granted in common form, the only security is the Oath of the Executor; and experience has proved that for the immense majority of cases it is amply sufficient. A very little consideration will show that it would be absolutely impossible to establish any *a priori* guards or cautions, which would not, from the delay and expense, occasion an infinitely greater loss to the Public, than may sometimes arise from what is called snatching Probate of a paper, afterwards found not entitled thereto. Any notice to Heirs-at-law, next of Kin, prior Devisees, or Legatees, would be found utterly incompatible with the expedition and economy, which are the most essential ingredients in the administration of every-day justice."

However, it must have seemed both inefficient and unduly expensive to require citations to interested parties and proof by both attesting witnesses before the ordinary in a case where there was no controversy whatever as to the due execution of the will.

The present English probate organization distinguishes sharply between contentious and noncontentious business; and it would seem that this distinction bears a direct relation to the maintenance of efficiency in the court organization. Noncontentious business is defined in the Supreme Court of Judicature

²⁴⁸ p. 37.

Consolidation Act of 1925,²⁴⁹ in almost exactly the same terms as are used in the Court of Probate Act of 1857,²⁵⁰ as follows:

“ ‘Noncontentious or common form probate business’ means the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the High Court in contentious cases where the contest has been terminated, and all business of a noncontentious nature in matters of testacy and intestacy not being proceedings in any action, and also the business of lodging caveats against the grant of probate or administration.”

The Principal Registry of Probate at London has jurisdiction of noncontentious business,²⁵¹ and legislation also provides that grants may be made in common form by district probate registrars.²⁵² Without doubt the bulk of the probate business of England is handled as noncontentious business by probate registrars. Otherwise it would be quite impossible for five judges to handle all the probate business for the people of England. In the latest edition of Tristram and Coote’s *Probate Practice* this noncontentious procedure is described.²⁵³

“The solicitor, in order to obtain a grant of representation to a deceased person in the Principal Registry, must leave at the *Receiver’s Department* the ‘papers to lead the grant,’ viz. the will and codicils (if any); the oath; the bond (if any); the Inland Revenue affidavit, duly stamped, and such affidavits, renunciations, certificates, etc., as may be necessary. The *Receiver* gives a receipt for the papers

“In the registry, the calendars are searched to ascertain that no other grant has been made in respect of the same estate, the papers are examined at the ‘*Seals*’ Department, and, if approved, a form of grant is prepared, and attached

²⁴⁹ 15-16 Geo. 5, c. 49, § 175, p. 1197 at 1286 (1925).

²⁵⁰ 20-21 Vict., c. 77, p. 422 (1857).

²⁵¹ 15-16 Geo. 5, c. 49, § 150 (1925).

²⁵² 15-16 Geo. 5, c. 49, § 151 (1925).

²⁵³ TRISTRAM & COOTE’S PROBATE PRACTICE (18th ed. 1940) 14.

to a photographic copy of the will and codicils (if any). The grant is signed by the Registrar and sealed with the seal of the Probate Division.

"On the production of the receipt given by the *Receiver* the grant usually can be obtained at the *Sealer's* Department after 12:30 p. m. on the fourth day after the papers were lodged."

Contentious probate business is handled before one or more judges of the High Court.²⁵⁴

In the United States the form of probate court organization in the majority of jurisdictions appears to indicate some recognition of the difference between contentious and non-contentious business; though in others this differentiation has apparently been lost sight of. Thus, as is indicated later, in a large group of states an appeal from the decision of the probate court involves a trial *de novo* in the court of general trial jurisdiction. In those jurisdictions the probate judge ordinarily is not required to have as high qualifications as the trial judge. Not infrequently he is not required to be a member of the bar at all; his salary is, in practically all cases, less than that of the judge of the trial court of general jurisdiction. In a general way it may be said that noncontentious matters come before the probate judge and that, in those matters in which the contest is more serious, the issues are settled before the trial court of general jurisdiction. There is nothing to prevent the probate judge from hearing contentious matters. Indeed, ordinarily he must do so in the first instance. But, if a party is sufficiently interested to appeal, he can have the issues tried anew by the trial judge. In a considerable group of states there is more or less of an attempt to retain the old distinction between probate in common and in solemn form. That is to say, probate may be summary and

²⁵⁴ 15-16 Geo. 5, c. 49, §§ 20, 55, 56 (1925); 18-19 Geo. 5, c. 26, § 6 (1928).

without notice; or it may be on notice to interested parties; and the proceeding on notice may be either the original hearing or a subsequent hearing on the issue before the same court. In many states provision is made for a proceeding known as a contest, which is a trial of the issue on the due execution of the will. It has sometimes been said that the contest is similar to the old probate in solemn form.²⁵⁵ However, in some states it would seem to resemble the device of framing the issue *devisavit vel non* and sending it over to a court of law to be tried.²⁵⁶ Very commonly contest takes place in the trial court of general jurisdiction. A brief consideration of the procedure in a few typical states will illustrate the extent to which there is any differentiation of function with respect to contentious and noncontentious business.

Florida, although it has recently enacted a new probate code,²⁵⁷ is one of those jurisdictions which still retains something of the old distinction between probate in common and in solemn form. Probate is in the county judge's court. No citation to interested parties before probate is required unless a caveat has been filed by an heir or distributee.²⁵⁸ Then the caveator must receive notice. When a will is admitted to probate, the personal representative or any other interested person may take steps to have interested parties served with notice, including notice by publication. A subsequent hearing in the judge's court for revocation of probate (which apparently takes the place of the will contest or probate in solemn form found in some states) may be had on the petition of an interested party. The privilege of petitioning for revocation of probate is limited to any heir or distributee of the estate of a decedent except those who have been served

²⁵⁵ See *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166 (1887); *Shaw v. Camp*, 61 Ill. App. 68 (1895); *Collier v. Idley's Exrs.*, (N. Y. 1849) 1 Bradf. Surr. 94.

²⁵⁶ Pa. Stat. Ann. (Purdon, Supp. 1943) t. 20, § 1961.

²⁵⁷ Fla. Acts, 1933, c. 16103, p. 544.

²⁵⁸ Fla. Stat. Ann. (1941) §§ 732.23, 732.29.

with citation before probate or who are barred under section 732.29 (the section dealing with the case where an heir or distributee has filed a caveat).²⁵⁹

In Georgia the procedure follows much more closely the English ecclesiastical procedure.²⁶⁰ Probate may be either in common or in solemn form before the court of ordinary. The statutes also provide for an appeal with trial *de novo* in the superior court, which is the trial court of general jurisdiction.

In Missouri the original hearing for probate of the will may be without notice,²⁶¹ but there is no provision for contest in the probate court. This takes place in the trial court of general jurisdiction and is in the nature of an appeal with trial *de novo*.²⁶² Unlike Florida, however, the Missouri statute permits any interested party to contest and does not limit the right to contest to persons who were not served with notice of the original application for probate in the probate court.²⁶³ Missouri is also one of those states which recognizes that an appeal from a decision of the probate court involves a trial *de novo* of the issues in the circuit court.²⁶⁴

In nearly half the states no grant of probate or administration, other than the appointment of a special administrator, is possible without notice to interested parties unless such notice is waived. In some of these there is a provision for contest after probate; in others there is not. In Michigan, for example, there is no provision for contest after probate, as such. But if interested parties file a contest before probate in the

²⁵⁹ Fla. Stat. Ann. (1941) § 732.30.

²⁶⁰ Ga. Code Ann. (1937) §§ 113-601, 113-602, 113-605. As to appeals, see §§ 6-201, 6-501.

²⁶¹ Mo. Rev. Stat. Ann. (1942) § 529; *State ex rel. Mitchell v. Gideon*, 215 Mo. App. 46, 237 S. W. 220 (1922).

²⁶² Mo. Rev. Stat. Ann. (Supp. 1943) § 538; *Techenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46 (1908).

²⁶³ Mo. Rev. Stat. Ann. (Supp. 1943) § 538.

²⁶⁴ Mo. Rev. Stat. Ann. (1942) § 291.

probate court, the whole matter may be transferred to the circuit court for hearing.²⁶⁵ Moreover, provisions for appeal by trial de novo in the circuit court²⁶⁶ have the effect of a contest after appeal in the trial court of general jurisdiction.

In California the trial court of general jurisdiction, namely the superior court, is the court in which probate matters are heard. Moreover, appeals are not trials de novo but are heard by the same appellate courts which hear appeals in civil cases. In spite of the fact that the petition for probate or administration is always heard on notice to interested parties,²⁶⁷ statutes provide for a contest after probate, which takes place in the superior court sitting in probate.²⁶⁸ Contest after probate is permitted by an interested person, "other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein."²⁶⁹ In California, since notice is required before probate and since the trial court of general jurisdiction is the court handling probate matters, it would seem that the provisions for contest after probate are at variance with any attempt to differentiate between contentious and noncontentious business. Quite possibly contest after probate bears some slight resemblance to probate in solemn form. But if so, it merely means that there may be two hearings, instead of one, on the question of the due execution of the will.

In at least two important jurisdictions, New York and Massachusetts, where proceedings for probate or administration are initiated on notice to interested parties, there is, strictly speaking, neither contest after probate nor trial de

²⁶⁵ Mich. Stat. Ann. (1943) § 27-3178(36).

²⁶⁶ Mich. Stat. Ann. (1943) § 27-3178(36).

²⁶⁷ Cal. Prob. Code (Deering, 1941) §§ 327, 441.

²⁶⁸ Cal. Prob. Code (Deering, 1941) § 380.

²⁶⁹ Cal. Prob. Code (Deering, 1941) § 380.

novo on appeal.²⁷⁰ In New York, in order to contest the will, objections must be filed in the surrogate's court at or before the close of testimony for the proponent, or at such subsequent time as the surrogate may direct.²⁷¹ But it is clear that this contest takes place in the surrogate's court before the will is admitted to probate. In Massachusetts, the only contest is one arising in the probate court before the will is admitted to probate.²⁷² The probate judge, however, has the power to send issues to the superior court to be tried there before a jury.²⁷³

To present an adequate account of the differentiation between contentious and noncontentious business, something should be said with reference to the function of clerks and registers of probate. This matter is discussed at some length in subsequent paragraphs. At this point it may be observed that, in most jurisdictions, the clerk or register has no judicial powers. But, even if he does not, the clerical business of the court may be so handled by him that the judge is enabled to supervise a very large volume of judicial business. This obviously is true in New York City, although the New York statutes do not give the clerk of the surrogate court judicial powers.

By way of conclusion on the general question of the distinction between contentious and noncontentious business, the following observations are presented for consideration: The common practice of having a probate judge with inferior

²⁷⁰ See 2 WARREN'S HEATON, SURROGATES' COURTS (6th ed. 1941) § 182; NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS (3d ed. 1937) § 30.

²⁷¹ N. Y. Surr. Ct. Act, § 147. It is true, however, that on an appeal upon the facts, the appellate court has "the same power to decide the questions of fact which the surrogate had" and may receive further testimony. See N. Y. Surr. Ct. Act, § 309.

²⁷² Mass. Ann. Laws (1932) c. 192, §§ 2-3. See also NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS (3d ed. 1937) § 30.

²⁷³ Mass. Ann. Laws (1932) c. 215, § 16.

qualifications handle all probate business in the first instance, with contest or trial de novo in the trial court of general jurisdiction, doubtless, in a rough way distinguishes between contentious and noncontentious business. It is true, the probate judge has jurisdiction over contentious as well as non-contentious business. But if a party to the contentious business regards the issue of sufficient importance, he can, by the device of contest or appeal, have it tried again in the trial court. However, it would seem that this is a very inefficient way of distinguishing between contentious and noncontentious business. The probate judge, in spite of his lack of superior qualifications, does try contentious matters in the first instance; and when they are tried anew in the trial court, the result is a wasteful duplication of judicial effort. The prevalent doctrine that there should be one trial and one appeal would seem to be applicable to issues in probate courts as well as elsewhere. Where there is adequate notice for the first hearing and a judge of sufficient ability, there would seem to be little or no justification for a retrial of the issues in the probate or any other court. Such is the result reached in New York and Massachusetts, where no contest after probate is provided for and a judge who is sufficiently qualified to make a final decision on the issues sits in the surrogate or probate court.

There are, however, strong arguments for an ex parte hearing without notice, somewhat like the old probate in common form. This prevents the expense and inconvenience of a special administratorship, and probably results in less wasting of the estate immediately after the death of the decedent. If such a hearing is permitted, it would be possible, as in England, to have its routine handled by clerks or registrars. But the whole matter could well be under the direct supervision of a judge of recognized competence. A further hearing on the issue involved at such summary hearing should

then be premitted before the same court, but only on the petition of interested parties who were not served with notice or did not appear in the first hearing.

V. JURISDICTION OF PROBATE COURTS OVER LAND

As has already been indicated,²⁷⁴ one of the most serious defects in the English probate system of the period prior to the middle of the nineteenth century was the great divergence in the treatment of real and personal estate. The ecclesiastical courts had no jurisdiction whatever over the decedent's land. They admitted wills of personalty to probate; but wills of land were not probated there nor anywhere else. The personal representative took title to personalty; the title to land passed to the heir or devisee immediately on the death of the decedent. But by English legislation previously described²⁷⁵ the treatment of land and personalty became practically uniform. A will of land is now probated just as a will of personalty. The jurisdiction of the Probate Division over the administration of the decedent's land was accomplished by the simple expedient of a statute which provides that interests in land pass to the personal representative just as chattels had passed theretofore.

We are now ready to consider the question: To what extent have American probate courts acquired jurisdiction over the lands of decedents? Certainly they have departed radically from the pattern of the English ecclesiastical courts; yet it is clear that the development has not been like that of the modern English probate jurisdiction.

The subject of our inquiry is obviously significant as a matter of procedure and due process. It is believed that the entire proceeding to administer the estate of a deceased person is a unit and is a proceeding *in rem*. If that be true, and if

²⁷⁴ See subdivision I, *supra*.

²⁷⁵ 60-61 Vict., c. 65 (1897).

the probate court does in fact administer the real estate of the decedent, then a reasonable notice to interested parties at the time of the initial step in the administration proceeding would suffice for hearing on all subsequent matters.²⁷⁶ On the other hand, if the probate court has no general jurisdiction over land, but acquires it merely for the purpose of some particular step in the proceeding, such as land sales or the collection of rents, then notice to interested parties must be given at each such step.

Here, however, we are interested primarily in court organization rather than in procedure or due process as such. But in that connection also the question of jurisdiction over land is significant. It is commonly assumed that inferior courts, such as justice courts and county courts, are not to be entrusted with issues involving the determination of titles to land. These matters are normally placed in the hands of the trial judges or of others equally well qualified. If, then, the probate court has jurisdiction of the land of the decedent, that is a strong argument for a highly qualified judge in the judicial organization.

It is believed that in every jurisdiction in this country the probate court has some jurisdiction over land of the decedent. The extent of this jurisdiction, however, varies greatly. For convenience our subject of inquiry may be stated in the form of three questions. First, does the probate court have jurisdiction over the probate of a will of land? Second, to what extent, if any, does the personal representative have title to land during administration? Third, does the probate court exercise general control over the land of the decedent throughout the course of administration? In other words, is the decedent's land subject to the jurisdiction of the probate

²⁷⁶ This, of course, refers to a minimum requirement. It would seem desirable, aside from questions of constitutionality, to have some sort of notice for sales of land.

court from the initial steps to have the will probated or to secure a grant of administration up to the time of the final order of distribution?

First, as to probate of wills of land, it is believed that the old English doctrine that a will of land is not subject to probate has almost entirely disappeared in this country. In nearly every jurisdiction a testamentary disposition of land must be admitted to probate before devisees can claim under it. This result in many states is based on statutes to the effect that no will is effectual to pass title to real or personal property without probate or that a will cannot be introduced in evidence until admitted to probate.²⁷⁷ In a very few jurisdictions the necessity for and effect of probate of a will of real property may not be the same as that of a will involving personalty;²⁷⁸ but it is believed that wills involving real property are subject to probate in all states.

Second, does the personal representative have title to land during administration? In general, the answer is that he does not. That is to say, the majority of jurisdictions adhere to the old English view that title to personalty passes to the

²⁷⁷ See, for example, Mich. Stat. Ann. (1943) § 27.3178(90): "No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court as provided in this chapter, or on appeal, in the circuit court or supreme court; and the probate of a will of real or personal estate, as above mentioned, shall be conclusive as to its due execution."

Ky. Rev. Stat. (1942) § 394.130: "No will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until superseded, reversed or annulled."

In some states the courts have decided, without the aid of a statute, that a will devising land must be admitted to probate. *Inge v. Johnston*, 110 Ala. 650, 20 So. 757 (1895); *Farris v. Burchard*, 242 Mo. 1, 145 S. W. 825 (1911).

²⁷⁸ Thus, in New York (N. Y. Surr. Ct. Act, § 144) specific provision is made for the probate of a will involving real property. But it would seem that this is not necessary to prove title. See *Bouton v. Fleharty*, 215 App. Div. 180, 213 N. Y. S. 455 (1926); *Corley v. McElmeel*, 149 N. Y. 228, 43 N. E. 628 (1896).

In Tennessee the order admitting to probate may not have quite the same conclusive effect on real property which it has with respect to personalty. *State v. Lancaster*, 119 Tenn. 638, 105 S. W. 858 (1907); *Grier v. Canada*, 119 Tenn. 17, 107 S. W. 970 (1907).

personal representative, but that title to real estate passes to the heir or devisee.²⁷⁹ In no jurisdiction does title to all the decedent's realty pass to the personal representative as is provided in the present English legislation. It is true, in Georgia, Oregon and Virginia, statutes provide that the title to land registered under land registration acts (that is, so-called Torrens system registration) passes to the personal representative.²⁸⁰ And a Georgia statute indicates that in that state for some purposes title to devised land passes to the executor and not to the devisee during administration; ²⁸¹ but legislation in the same state provides that title to intestate land passes to the heir.²⁸²

In two states,²⁸³ California and Texas, are found statutes which indicate that title to both real and personal property

In general, on the necessity of probate of a will involving real property, see Appendix note to §§ 81-85 of Model Probate Code.

²⁷⁹ *Hooker v. Porter*, 271 Mass. 441, 171 N. E. 713 (1930); *Richards v. Pierce*, 44 Mich. 444, 7 N. W. 54 (1880); *Roorbach v. Lord*, 4 Conn. 347 (1822). For statutes providing that real estate passes directly to the heirs or devisees, see N. M. Stat. (1941) § 33-702; Wash. Rev. Stat. (1932) § 1366. In general, see ATKINSON, *WILLS* (1937) 528-530; 4 PAGE, *WILLS* (3d ed. 1941) § 1586.

²⁸⁰ Ga. Code Ann. (1937) § 60-508; Ore. Comp. Laws (1940) § 70-368; Va. Code (1942) § 5225 (this section provides that the acts establishing the Torrens system be continued in force. 'Section 61 of that act as amended provides that title to registered land vests in the personal representative).

²⁸¹ Ga. Code Ann. (1936) § 113-801: "All property, both real and personal, being assets to pay debts, no devise or legacy passes the title until the assent of the executor is given to such devise or legacy."

And see *Peck v. Watson*, 165 Ga. 853, 142 S. E. 450 (1927).

²⁸² Ga. Code Ann. (1936) § 113-901: "Upon the death of the owner of any estate in realty, which estate survives him, the title shall vest immediately in his heirs at law, subject to be administered by the legal representative, if there is one, for the payment of debts and the purposes of distribution."

²⁸³ Cal. Prob. Code (Deering, 1941) § 300; Tex. Civ. Stat. Ann. (Vernon, 1935) art. 3314.

In a few other states are found statutes which are to the effect that the property of an intestate person, both real and personal, passes to his heirs subject to the control of the court and to the possession of the administrator. The following are of this variety: Idaho Code (1932) § 14-102; Mont. Rev. Code (1935) § 7072; N. D. Comp. Laws (1913) § 5742; Okla. Stat. (1941) t. 84, § 212; S. D. Code (1939) § 56.0102.

passes to the distributee and not to the personal representative. The California statute is as follows:

"When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division 2 of this code: but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division 3 of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code."

Much can be said for legislation of this character. Certainly, there is no real justification today for a distinction between real and personal estate with respect to the title of the personal representative. The explanation for it is purely historical. But it is doubtful whether the modern English rule giving the personal representative title to all property of the decedent, both real and personal, would work well in the United States. Frequently estates are not administered at all. And in such cases the matter of determining title would be simplified if legislation like the California statute just quoted were in force. The title is then in the distributees whether the estate has been administered or not.

Of course, the mere fact that title to realty is in the distributee or is in the personal representative, during administration, does not go far in describing the real situation. In all jurisdictions, regardless of what technical rule is in force as to the location of title, the distributee has some interest in the property as of the time of the decedent's death.²⁸⁴ On the

²⁸⁴ See *Brewster v. Gage* (C. C. A. 2d, 1929) 30 F. (2d) 604, aff'd 280 U. S. 327, 50 S. Ct. 115 (1930).

other hand, even under the California type of statute, it is clear that the personal representative has a very substantial interest in the estate during the course of administration, though it may be described in terms of a right to possession or a power of disposition rather than in terms of title.

The third and most important question to be raised is: Does the probate court exercise jurisdiction over the decedent's lands throughout the course of administration? In many states there can be no doubt that the answer is in the affirmative. Thus, in the California statute as to the title of distributees, which has already been quoted, it is stated that such title is "subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division 3 of this code." Another California statute provides that the personal representative must take possession of all the estate of the decedent, real and personal.²⁸⁵ In other states the matter is not so clear; no such statutes as these are found. And it is necessary to consider the jurisdiction of the probate court over land in a number of specific situations, such as the contents of the inventory, judicial sales and the decree of distribution. In some of these states we shall find that the jurisdiction of the probate court is limited to particular proceedings with respect to land or to particular lands of the decedent. But in others we may conclude from these specific provisions as to jurisdiction that the court does have general jurisdiction over the decedent's lands during the whole course of administration.

In a majority of states, statutes require that lands be included in the inventory.²⁸⁶ It is believed, however, that this

²⁸⁵ Cal. Prob. Code (Deering, 1941) § 571.

²⁸⁶ The statutes in the following states so provide: Ariz. Code (1939) § 38-803; Cal. Prob. Code (Deering, 1941) § 600; Colo. Stat. (1935) c. 176, § 145; Conn. Gen. Stat. (1930) § 4911 (all the property except real estate situated outside the state); D. C. Code (1940) § 18-401 (inventory includes

may not be of great significance in determining the question of jurisdiction.²⁸⁷ Its purpose may well be to enable the court to determine how large the estate is and whether it is solvent. Thus, in Massachusetts land must be included in the inventory.²⁸⁸ Yet the personal representative ordinarily has no right to the rents and profits during the administration.²⁸⁹ The decree of distribution does not deal with real estate.²⁹⁰ And, while sales of land take place under license of the probate court, the personal representative has no right to deal with any land until such license is obtained.²⁹¹ One writer on the subject has summed the matter up by saying:²⁹² "Ordinarily, unless the will provides otherwise, the executor or administrator has nothing directly to do with real estate." On the other hand, in New York state, where the inventory does not include real estate,²⁹³ the surrogate's court

realty only if court so orders); Fla. Stat. Ann. (1941) § 733.04 (all the property); Ga. Code Ann. (1936) §§ 113-1401, 113-1402 (includes real estate in the county where administration is had); Idaho Code (1932) § 15-403; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 323-324; Iowa Code (1939) § 11913; Kan. Gen. Stat. (Supp. 1943) § 59-1201; Me. Laws, 1935, c. 78, p. 257; Mass. Ann. Laws (1932) c. 195, § 5; Mich. Stat. Ann. (1943) § 27.3178(382); Minn. Stat. (1941) § 525.33; Mo. Rev. Stat. Ann. (1942) § 58; Mont. Rev. Code (1935) § 10131; Neb. Comp. Stat. (1929) § 30-401; Nev. Comp. Laws (Supp. 1941) § 9882.100; N. M. Stat. (1941) § 33-302; N. C. Gen. Stat. (1943) § 28-50; N. D. Comp. Laws (1913) § 8714; Ohio Gen. Code (Page, 1937) § 10509-41 (real estate located in Ohio); Okla. Stat. (1941) t. 58, § 283; Ore. Comp. Laws (1940) § 19-401; S. D. Code (1939) § 35.1203; Tex. Civ. Stat. Ann. (Vernon, 1925) § 3408; Utah Code (1943) § 102-7-3; Vt. Pub. Laws (1933) § 2805; Va. Code (1942) § 5403; Wash. Rev. Stat. (1932) § 1466; W. Va. Code (1937) § 4182; Wis. Stat. (1943) § 312.01 ("all the property"); Wyo. Rev. Stat. (1931) § 88-2303.

²⁸⁷ In *Lindholm v. Nelson*, 125 Kan. 223 at 229, 264 P. 50 (1928), the court said: "There are several reasons why it is advisable to have the real estate listed in the inventory, but this listing gives the administrator no authority over it, and gives the probate court no jurisdiction to dispose of it, except under conditions specifically provided by statute."

²⁸⁸ See note 13, supra.

²⁸⁹ *Towle v. Swasey*, 106 Mass. 100 (1870).

²⁹⁰ See NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS (3d ed. 1937) § 210; Mass. Ann. Laws (1932) c. 206, § 21.

²⁹¹ *Hooker v. Porter*, 271 Mass. 441, 171 N.E. 713 (1930).

²⁹² NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS (3d ed. 1937) p. 189, § 76.

²⁹³ N. Y. Surr. Ct. Act, §§ 195-197.

is by statute given power "in the cases and in the manner prescribed by statute To direct the disposition of real property, and interests in real property of decedents, and the disposition of the proceeds thereof" ²⁹⁴ and perhaps it may be said that the court has at least potential, if not actual, jurisdiction over the decedent's land during probate.

In most states, sales of land to pay debts and legacies are, or can be, handled in the probate court.²⁹⁵ In others, it is necessary to initiate an independent proceeding in the court of general jurisdiction for this purpose.²⁹⁶ If a state is of the latter group, it is clear that the probate court does not have general jurisdiction of land of the decedent. On the other hand, if the sale is in the probate court, it may be that, as in Massachusetts, only the specific piece of land to be sold comes under the supervision of the probate court for this purpose.

Other provisions in various states, dealing with the jurisdiction of the probate courts (or of personal representatives) over land in particular situations, are statutes as to the specific performance of land contracts,²⁹⁷ statutes as to the personal representative's right to the possession of land, or to the rents

²⁹⁴ *Id.* at § 40. The personal representative is given power to take possession of the real property and sell, mortgage or lease it. N. Y. Dec. Est. Law, §§ 13 and 123. In general, see 3 WARREN'S HEATON, SURROGATES' COURTS (6th ed. 1941) § 230.

²⁹⁵ States in which the probate court (or other court exercising probate jurisdiction) does not handle sales of land are Kentucky, Nebraska, New Mexico and West Virginia. In North Carolina the clerk of the superior court has the functions of a probate court, but sales of real estate are handled by the superior court itself. Indiana probably belongs to this group also. In that state the circuit court handles probate business, sitting as a probate court, and also has ordinary civil jurisdiction. Sales of land are handled in this court in a separate proceeding, but it may be questioned whether such a proceeding is in the probate or civil side of the court.

In other states the probate court (or other court exercising probate jurisdiction) has jurisdiction over sales of land. This jurisdiction may be exclusive, e.g., Ga. Code Ann. (1937) § 24-1901, or concurrent with some other court, e.g., Va. Code (1942) § 5396.

²⁹⁶ For a statute of this sort, see Neb. Comp. Stat. (1929) § 30-1102.

²⁹⁷ See, for example, Mass. Ann. Laws (1932) c. 204, § 1; Mich. Stat. Ann. (1943) § 27.3178(509) et seq.

and profits of it, statutes as to his right to bring particular suits with respect to land,²⁹⁸ statutes providing for a specific decree of distribution to include interests in land, statutes providing for the partition of interests of distributees in land,²⁹⁹ and statutes providing for the determination of heirship.³⁰⁰

Perhaps the most significant of these are the ones dealing with the personal representative's control of real estate and with the decree of distribution. The California statutes requiring the personal representative to take control of real estate have already been referred to.³⁰¹ The Indiana statute provides that the personal representative *may* take possession of the real estate if there is no heir or devisee to take posses-

²⁹⁸ Cal. Prob. Code (Deering, 1941) § 573: "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon . . . may be maintained by and against executors and administrators."

Fla. Stat. Ann. (1941) § 733.02 provides that the personal representative may bring actions with respect to real property for the purpose of quieting title for trespass, for waste, and against co-tenants. Provision is also made for heirs or devisees themselves, or jointly with the personal representative, to bring suits for the possession or recovery of real estate or to quiet the title thereto.

While presumably in neither of these states would the suit be brought as an action in probate, the personal representative would, in suing, be acting as an appointee of the court sitting in probate.

²⁹⁹ These are of two kinds: (a) Those providing for partition where the decedent was a co-tenant. Here the suit would not ordinarily be in the probate court. See Cal. Prob. Code (Deering, 1941) § 575. (b) They may provide for a partition in the probate court by heirs or devisees who take the decedent's land as co-tenants.

³⁰⁰ In a jurisdiction where there is a specific order of distribution which includes land, the proceeding for the determination of heirship is likely to be an independent proceeding, whether it is in the probate court or not, because it is chiefly employed in a case where there has been no administration proceeding. See Minn. Stat. (1941) § 525.31, where the proceeding is in the probate court, and applies to unadministered land or to situations "when real estate or any interest therein has not been included in a final decree." But compare Mich. Stat. Ann. (1943) §§ 27.3178(145) to 27.3178(149) where the determination is in the probate court and may be either independent of or a part of the administration proceeding. Where the personal representative does not take charge of land and the probate court does not purport to distribute it, it would seem that the determination of heirship is an independent proceeding. See Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 209-211 (probate court).

³⁰¹ See notes 10 and 12, *supra*.

sion, but does not require him to do so.³⁰² Still other states vest the right to possession of land in the heir or devisee.³⁰³ Some statutes expressly provide that the personal representative is entitled to rents and profits of land,³⁰⁴ and, indeed, this would seem to be implied where he is given a right to possession.

In a considerable number of states the decree of distribution must make a specific distribution of real and personal property of the estate. Thus, the Michigan statute on this subject reads in part as follows:³⁰⁵

" . . . the probate court shall, by order for that purpose, assign the residue of the estate, if any, to such persons as are by law entitled to the same

"In such order the court shall . . . name the persons and the proportions or parts to which each shall be entitled."

It is not uncommon to have a statute such as the above followed by provisions for the partition of interests of co-distributees. Thus the provisions in the Michigan probate code on this subject begin as follows:³⁰⁶

"When the estate, real or personal, assigned to 2 or more heirs, devisees or legatees shall be in common and undivided, and the respective shares shall not be separated and distinguished . . . the probate court may on the petition of any of the persons interested fix a date for hearing on the partition and distribution."

In other states the only provisions for a decree of distribution are restricted to personal property.³⁰⁷

³⁰² See Ind. Stat. (Burns, 1933) § 6-1151.

³⁰³ Mo. Rev. Stat. Ann. (1942) § 129 (personal representative not entitled to possession or to rents and profits except on court order).

³⁰⁴ E.g., Ariz. Code (1939) § 38-809.

³⁰⁵ Mich. Stat. Ann. (1943) §§ 27.3178(165), 27.3178(166).

³⁰⁶ Mich. Stat. Ann. (1943) § 27.3178(168).

³⁰⁷ Ore. Comp. Laws (1940) §§ 19-1201, 19-1202.

Returning to our original question, it would seem that if statutes give the personal representative possession of the real estate during the administration and provide for a probate decree distributing the real estate to those entitled, the probate court does have jurisdiction over the decedent's lands throughout the course of administration. On the other hand we may in some instances reach the same conclusion without both of these types of statutes. But in other states, all we can conclude is that the probate court does have jurisdiction of the decedent's lands in certain matters during administration.

In conclusion, it is apparent that a majority of probate courts have a very considerable jurisdiction over land. While it is true that the mere filing of an inventory which includes land or the probating of a will devising land does not call for any extensive knowledge of land law, when it comes to making a specific decree distributing land, the same knowledge of the intricacies of the law of real property is required of the probate judge as is called for in the case of the trial judge who construes a complicated land trust agreement. Indeed, whether the statutes specifically empower the probate court to construe wills or not (and many of them in fact do so) ³⁰⁸ the judge who makes a specific decree of distribution, such as is required by the Michigan statute already quoted, must be prepared to construe an intricate testamentary disposition of land. When we add to that the fact that many statutes also give the probate court jurisdiction of testamentary trusts involving land, and even, in some states, of inter vivos trusts involving land, the conclusion is hard to avoid that a judge is needed in the probate court who is as well qualified as the judge of the trial court of general jurisdiction. Indeed it might be said that he should be a specialist in the law of property in its broadest aspects.

³⁰⁸ N. Y. Surr. Ct. Act, § 40, subd. 8.

VI. JURISDICTION OF PROBATE COURTS OVER MATTERS
OTHER THAN DECEDENTS' ESTATES

The scope of probate court functions has ever been a varying one. We have already traced one aspect of this in noting an expanding jurisdiction and control over the administration of decedents' estates. Jurisdiction in other fields has also been gradually added to that possessed by the probate court as an established institution. The totality of its functions today makes the maintenance of a probate court in every county almost a necessity.

Mention has been made of the origin of orphans' courts in this country.³⁰⁹ If it was a natural step for probate jurisdiction to be conferred upon orphans' courts, it certainly was not an unnatural step for a jurisdiction over minors and their estates to be added to organized probate courts elsewhere. The historical amalgamation of guardianship and curatorship with probate jurisdiction is readily understandable where occasioned by the administration upon a decedent's estate in which minors are interested.

In England guardians of the person and property of minors were appointed by the court of chancery and the court of exchequer.³¹⁰ They were also appointed by ecclesiastical courts with respect to personalty.³¹¹ In America a general power to make such appointments has always been regarded as inherent in courts possessing equity powers.³¹² No interest in a decedent's estate is necessary to invoke this power. But the expensiveness and cumbersomeness of equity procedure early led to giving this jurisdiction—at least a concurrent one—to other courts.³¹³ Guardianship of the persons of minors and of their

³⁰⁹ See discussion under II-B at note 59, *supra*.

³¹⁰ WOERNER, *GUARDIANSHIP* (1897) § 16.

³¹¹ *Id.* at § 3.

³¹² *Id.* at § 18.

³¹³ See, for example, Complete Revisal of all the Acts of Assembly of the Province of North Carolina, printed by Davis, 285-291 (1773) and *Laws of*

estates has since become an established part of probate jurisdiction.³¹⁴ A constitutional provision conferring general jurisdiction upon probate courts in all probate matters has been said to include the power to appoint guardians.³¹⁵ Only in rare cases does equity appoint guardians or assume a continuing control over them.³¹⁶

Guardianship over insane persons, lunatics, idiots, imbeciles or incompetents by whatever name they may be called, originally within the jurisdiction of the English chancery courts, has also been lodged for the most part in established probate

North Carolina, edited by Iredell, 202-208 (1791) (act of 1762). See also WOERNER, GUARDIANSHIP (1897) § 18.

³¹⁴ This development is fully described in WOERNER, GUARDIANSHIP (1897) § 24. Jurisdiction over guardians of minors and their estates is vested in the court exercising probate jurisdiction as follows: Ala. Code (1940) t. 13, § 278; Ariz. Code (1939) § 42-101; Ark. Dig. Stat. (1937) § 2883; Cal. Prob. Code (Deering, 1941) § 1405; Colo. Const., art. 6, § 23; Colo. Stat. (1935) c. 76, § 1, c. 176, § 83; Conn. Gen. Stat. (1930) §§ 4973, 4808; Del. Rev. Code (1935) c. 89; D. C. Code (1940) § 11-504; Fla. Stat. Ann. (1941) § 36.01; Ga. Code Ann. (1936) § 24-1901; Idaho Const., art. 5, § 21; Idaho Code (1932) § 1-1202; Ill. Const., art. 6, §§ 18, 20; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 37, § 303; Ind. Stat. (Burns, 1933) §§ 4-303, 4-2910, 4-3010; Iowa Code (1939) § 10763; Kan. Const., art. 3, § 8; Kan. Gen. Stat. (Supp. 1943) § 59-301; Ky. Rev. Stat. (1942) §§ 25.110, 387.020; Me. Rev. Stat. (1930) c. 75, § 9; Md. Code (1939) art. 93, § 152; Mass. Ann. Laws (1932) c. 215, §§ 3, 4; Mich. Stat. Ann. (1943) § 27.3178(19); Minn. Const., art. 6, § 7; Minn. Stat. (1941) § 525.54; Miss. Code (1942) § 404; Mo. Const., art. 6, § 34; Mo. Rev. Stat. Ann. (1942) § 2437; Mont. Rev. Code (1935) § 10401; Neb. Const., art. 5, § 16; Neb. Comp. Stat. (1929) §§ 27-503, 27-504; Nev. Const., art. 6, § 6; N. H. Rev. Laws (1942) c. 346, § 4; N. J. Rev. Stat. (1937) §§ 3:7-23.1, 3:7-28; N. M. Stat. (1941) § 16-410; N. Y. Surr. Ct. Act, §§ 40, 173; N. C. Gen. Stat. (1943) §§ 2-16, 33-1; N. D. Const., art. 4, § 111; N. D. Comp. Laws (1913) § 8524; Ohio Const., art. 4, § 8; Ohio Gen. Code (Page, 1937) § 10501-53; Okla. Const., art. 7, § 13; Okla. Stat. (1941) t. 20, § 271; Ore. Comp. Laws (1940) §§ 13-501, 22-101; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2241; R. I. Gen. Laws (1938) c. 426 and c. 569, § 1; S. C. Code (1942) §§ 208, 209; S. D. Const., art. 5, § 20; S. D. Code (1939) §§ 35.1801 et seq. and 32.0909; Tenn. Code (Michie, 1938) § 10225; Tex. Const., art. 5, § 16; Tex. Civ. Stat. Ann. (Vernon, 1925) art. 4102 et seq.; Utah Code (1943) § 102-13-1 et seq.; Vt. Pub. Laws (1933) § 2723; Va. Code (1942) § 5316; Wash. Rev. Stat. (1932) § 1371; W. Va. Const., art. 8, § 24; W. Va. Code (1937) § 357; Wis. Stat. (1943) §§ 253.03, 319.01; Wyo. Rev. Stat. (1931) c. 50.

³¹⁵ *Stewart Oil Co. v. Lee*, (Tex. Civ. App. 1943) 173 S. W. (2d) 791; *United States Fidelity & Guaranty Co. v. Hansen*, 36 Okla. 459, 129 P. 60 (1912); *Monastes v. Catlin*, 6 Ore. 119 (1876).

³¹⁶ WOERNER, GUARDIANSHIP (1897) 52-53.

courts in this country or in courts exercising probate jurisdiction.³¹⁷

Recognizing the need for some supervision over incompetents and to satisfy the requirement of the federal law designed to insure that the compensation and insurance paid by the U.S. Veterans' Bureau is properly conserved for their benefit, servicemen, their estates and dependents, thirty-four states have enacted the Uniform Veterans' Guardianship Act with some variations.³¹⁸ A degree of uniformity has thus been attained in the appointment of guardians for such servicemen and the administration of their estates derived from the Veterans Administration. The original act as promulgated by the Commissioners on Uniform State Laws in 1928 provides

³¹⁷ Ibid. Curatorship or conservatorship over estates of insane persons and other incompetents is vested in the court exercising probate jurisdiction as follows: Ala. Code (1940) t. 13, § 278; Ariz. Code (1939) § 42-135; Ark. Dig. Stat. (1937) § 2883; Cal. Prob. Code (Deering, 1941) § 1405; Colo. Const., art. 6, § 23; Colo. Stat. (1935) c. 105, § 9, c. 176, § 84; Conn. Gen. Stat. (1930) § 4815; Del. Rev. Code (1935) c. 89; D. C. Code (1940) t. 21, c. 2 (limited jurisdiction only); Fla. Stat. Ann. (1941) § 744.24 et seq.; Ga. Code Ann. (1936) § 24-1901; Idaho Const., art. 5, § 21; Idaho Code (1932) § 1-1202; Ill. Const., art. 6, §§ 18, 20; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 37, § 303; Ind. Stat. (Burns, 1933) §§ 4-303, 4-2910, 4-3010; Iowa Code (1939) § 10763; Kan. Const., art. 3, § 8; Kan. Gen. Stat. (Supp. 1943) § 59-301; Ky. Rev. Stat. (1942) §§ 25.110, 387.020, 387.210; Me. Rev. Stat. (1930) c. 75, § 9; Mass. Ann. Laws (1932) c. 215, § 3; Mich. Stat. Ann. (1943) § 27.3178(19); Minn. Const., art. 6, § 7; Minn. Stat. (1941) § 525.54; Miss. Code (1942) § 430; Mo. Const., art. 6, § 34; Mo. Rev. Stat. Ann. (1942) § 2437; Mont. Rev. Code (1935) § 10412; Neb. Const., art. 5, § 16; Neb. Comp. Stat. (1929) §§ 27-503, 27-504; Nev. Const., art. 6, § 6; N. H. Rev. Laws (1942) c. 346, § 4; N. J. Rev. Stat. (1937) §§ 3:7-33, 3:7-41; N. M. Stat. (1941) § 16-410; N. C. Gen. Stat. (1943) §§ 2-16, 33-1; N. D. Const., art. 4, § 111; N. D. Comp. Laws (1913) § 8524; Ohio Const., art. 4, § 8; Ohio Gen. Code (Page, 1937) § 10501-53; Okla. Const., art. 7, § 13; Okla. Stat. (1941) t. 20, § 271; Ore. Comp. Laws (1940) §§ 13-501, 22-101; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2241; R. I. Gen. Laws (1938) c. 426 and c. 569, § 1; S. C. Code (1942) §§ 208, 209; S. D. Const., art. 5, § 20; S. D. Code (1939) §§ 35.1801 et seq. and 32.0909; Tenn. Code (Michie, 1938) § 10225; Tex. Const., art. 5, § 16; Tex. Civ. Stat. Ann. (Vernon, 1925) art. 4102 et seq.; Utah Code (1943) § 102-13-1 et seq.; Vt. Pub. Laws (1933) § 2723; Va. Code (1942) § 1050; Wash. Rev. Stat. (1932) § 1371; W. Va. Const., art. 8, § 24; W. Va. Code (1937) § 357; Wis. Stat. (1943) §§ 253.03, 319.01; Wyo. Rev. Stat. (1931) c. 50.

³¹⁸ See 9 UNIFORM LAWS ANNOTATED (1942) 735.

for guardianship proceedings to be had in "any court of competent jurisdiction."³¹⁹ The revision of this act by the commissioners in 1942 makes no mention of any specific court.³²⁰ Nowhere is a reference to be found as to whether the probate, equity or court of general jurisdiction is referred to. Presumably the court where guardianships for other incompetents are cognizable is intended.

Jurisdiction over juvenile delinquents has involved totally different problems from general supervision over the property of minors or incompetents. Juvenile courts have been created in many places.³²¹ In some states such jurisdiction has been merely added to that of courts of general jurisdiction. In Idaho, Michigan and South Dakota it has been tacked on to the jurisdiction of probate courts.³²²

More closely related to the primary function of the administration of estates is the supervision over testamentary trusts. While it is true that the administration of a decedent's estate ceases upon final settlement and distribution by the personal representative to the testamentary trustee, it is also true, in a very real sense, that the subsequent administration by the testamentary trustee is but a continuation of the administration by the executor or administrator. In any matter requiring it, the jurisdiction of equity might be invoked at the instance of the trustee or of any beneficiary either as a remedial or a declaratory process. Any such procedure could be repeated any number of times. The more often equity jurisdiction is invoked in the administration of a single trust, the

³¹⁹ Uniform Veterans' Guardianship Act (1928) § 4.

³²⁰ Uniform Veterans' Guardianship Act (1942) § 5.

³²¹ For a discussion of this jurisdiction and of the various courts established to handle such matters, see 5 VERNIER, *AMERICAN FAMILY LAWS* (1932) and Supplement (1938) § 277.

³²² Idaho Code (1932) § 31-1302; Mich. Const., art. 7, § 13; Mich. Stat. Ann. (1943) § 27.3178(571); S. D. Code (1939) § 43.0302. In a few other states probate courts have been given jurisdiction in juvenile matters in certain counties.

more nearly it approaches complete supervisory jurisdiction. Equity has the power to exercise and frequently does exercise such complete supervision. Because of the similarity of the problems involved, the close relationship between the probate administration of the decedent's estate and the continued administration of the testamentary trust created by the decedent's will, and the fact that the trustee is often the same person who has served as executor, there has been a marked tendency to subject the latter administration to probate, rather than equity, supervision. Such is now an integral part of the probate statutes of some twenty-four states.³²³ An examination of these statutes reveals that the amount of such supervision varies from a duty on the part of the trustee to account periodically to the court to a more or less complete supervision approximating that of the probate court over the executor in the prior administration of the estate of the decedent.

Many of the same arguments could be assigned for subjecting inter vivos trusts to the same supervision. Only a preceding probate administration is lacking. However, many settlors prefer not to subject the trust created by them

³²³ Ariz. Code (1939) § 38-1509 (for settlement of accounts); Cal. Prob. Code (Deering, 1941) § 1120; Colo. Stat. (Supp. 1943) c. 176, § 227 (but testator may provide for no supervision in county court); Conn. Gen. Stat. (1930) §§ 4972-4976; Ind. Stat. (Burns, 1933) §§ 4-2910, 4-3010 (in Marion and Vanderburgh counties) and (Burns, Supp. 1943) §§ 6-2501 to 6-2526; Iowa Code (1939) §§ 10764, 11876; Kan. Gen. Stat. (Supp. 1943) §§ 59-1601 to 59-1611 (but testator may provide for no supervision in probate court); Me. Rev. Stat. (1930) c. 75, § 2, c. 82, §§ 1-13 (concurrent with superior court); Mass. Ann. Laws (1932) c. 215, § 6; Mich. Stat. Ann. (1943) § 27.3178(19); Mont. Rev. Code (1935) § 10352; Neb. Comp. Stat. (Supp. 1941) §§ 30-1801 to 30-1866; Nev. Comp. Laws (Supp. 1941) §§ 7718-7718.26; N. H. Rev. Laws (1942) c. 363; N. J. Rev. Stat. (Supp. 1941-43) §§ 3:7-13.4, 3:7-13.5 (only to qualify and have letters issued); N. Y. Surr. Ct. Act, §§ 167-171 (limited control); N. C. Gen. Stat. (1943) § 28-53 (for filing inventory and rendering accounts); Ohio Gen. Code (Page, 1937) §§ 10501-53, 10506-39; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2242 (orphans' court); S. C. Code (1942) § 209; Utah Code (1943) §§ 102-12-31, 102-12-32 (for rendition of accounts); Vt. Pub. Laws (1933) c. 134 (for rendition of annual accounts); Wash. Rev. Stat. (Supp. 1941) §§ 11548-1 to 11548-28 (amended by Wash. Laws, 1943, c. 152); Wis. Stat. (1943) § 253.03.

to judicial supervision, but to rely upon the integrity and ability of the trustee whom they have selected. Indiana, Iowa, Massachusetts, Nevada and Pennsylvania have brought inter vivos trusts under the supervisory control of probate courts.³²⁴ In Maine such jurisdiction may be invoked either in the probate or superior court.³²⁵ In Kansas such jurisdiction is possible where the beneficiary is a person under guardianship.³²⁶ Recent legislation has extended this jurisdiction to include life insurance trusts in Pennsylvania.³²⁷

A number of other functions have been added piecemeal to the broadening horizon of probate jurisdiction. Marriages may be solemnized by probate judges in some states.³²⁸ Divorces may be granted in the probate courts of Massachusetts,³²⁹ and in the county courts of Colorado³³⁰ if the amount of alimony sought does not exceed \$2000. Adoption proceedings have been lodged here in more than one-third of the states;³³¹ and proceedings for change of name in a few

³²⁴ Ind. Stat. (Burns, 1933) §§ 4-2910, 4-3010 and (Burns, Supp. 1943) §§ 6-2512 et seq.; Iowa Code (1939) §§ 10764, 11876; Mass. Ann. Laws (1932) c. 215, § 6; Nev. Comp. Laws (Supp. 1941) §§ 7718.11, 7718.12; Pa. Stat. Ann. (Purdon, Supp. 1943) t. 20, § 2253a.

³²⁵ Me. Rev. Stat. (1930) c. 75, § 2; c. 82, §§ 14-16.

³²⁶ Kan. Gen. Stat. (Supp. 1943) §§ 59-1601 to 59-1611.

³²⁷ Pa. Stat. Ann. (Purdon, Supp. 1943) t. 20, § 2253b.

³²⁸ No attempt is made here to collect the legislation on this subject. Frequently this power is bestowed upon judges of courts of record.

³²⁹ Mass. Ann. Laws (1932) c. 215, § 3.

³³⁰ Colo. Stat. (1935) c. 56, § 3.

³³¹ Ala. Code (1940) t. 27, §§ 1-9; Ark. Dig. Stat. (1937) § 254; Colo. Stat. (1935) c. 4, § 1 (jurisdiction in district or county court provided there is no juvenile court in the county); Conn. Gen. Stat. (1930) §§ 4809-4810; Del. Rev. Code (1935) §§ 3550-3553 (orphans' court); Idaho Code (1932) § 31-1106; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 4, §§ 1-13 (in circuit or county court); Ind. Stat. (Burns, Supp. 1943) § 3-115; Kan. Gen. Stat. (Supp. 1943) § 59-2101; Ky. Rev. Stat. (1942) §§ 405.140 to 405.990; Me. Rev. Stat. (1930) c. 75, § 9; Mass. Ann. Laws (1932) c. 210, § 1 and c. 215, § 3; Mich. Stat. Ann. (1943) § 27.3178(541) et seq.; Neb. Comp. Stat. (1929) § 43-101 et seq.; N. H. Rev. Laws (1942) c. 346, § 5; N. J. Rev. Stat. (1937) § 9:3-1 (orphans' court); N. Y. Domestic Relations Law, § 109 et seq. (concurrent with certain other courts); Ohio Gen. Code (Page, Supp. 1943) §§ 10512-9 to 10512-23; Okla. Stat. (1941) t. 10, §§ 46, 49; Ore. Comp. Laws (1940) § 63-401; Pa. Stat. Ann. (Purdon, Supp. 1943) t. 1,

states.³³² The granting of writs of habeas corpus has also been given to some probate courts,³³³ presumably on the assumption that when the general trial judge is not available, the probate judge can function since he is a judicial officer.

The combination of small civil and criminal jurisdiction with probate matters has been alluded to in discussing the early history of probate courts.³³⁴ In a dozen states at the present time limited civil and criminal jurisdiction is lodged in the court having probate jurisdiction.³³⁵

Some form of inheritance or estate taxes are now levied by every state except Nevada. The assessment of such a tax must needs occur more or less contemporaneously with the administration of the estate, because values at the date of death will determine the amount of tax, and payment by the personal representative out of assets in his hands is the most feasible and certain way of securing payment to the sovereign. In the determination of the tax the services and offices of the probate court in charge of the administration will be needed. The nature of the part to be played by the probate court in the accomplishment of this task varies all the way from furnishing

§§ 1-5 (orphans' court except in Philadelphia county where the municipal court has jurisdiction); R. I. Gen. Laws (1938) c. 569, § 1; S. D. Code (1939) §§ 14.0401 to 14.0408; Tenn. Code (Michie, 1938) §§ 9561, 10225 (concurrent with circuit court); Vt. Pub. Laws (1933) § 3322 (amended by Vt. Laws, 1941, No. 46, § 2); Wis. Stat. (1943) c. 322.

In Arizona, California, Iowa, Louisiana, Nevada, North Carolina, Utah, Virginia, Washington and Wyoming adoption proceedings are had in the court of general jurisdiction, which also handles probate matters.

³³² Ky. Rev. Stat. (1942) §§ 401.010 to 401.040; Me. Rev. Stat. (1930) c. 75, § 9; Mass. Ann. Laws (1932) c. 215, § 3; Mich. Stat. Ann. (1943) §§ 27.3178 (541-545, 561-562); Ore. Comp. Laws (1940) §§ 11-701 to 11-703; R. I. Gen. Laws (1938) c. 569, § 1; Tenn. Code (Michie, 1938) § 10225.

³³³ Ala. Code (1940) t. 13, § 297; Ind. Stat. (Burns, 1933) § 4-2910; Kan. Const., art. 3, § 8; Kan. Gen. Stat. (Supp. 1943) § 59-301; Ohio Const., art. 4, § 8; Ohio Gen. Code (Page, 1937) § 10501-53; Ore. Const., art. 7, § 13.

³³⁴ See discussion under II-B and notes 72 and 73, supra.

³³⁵ A limited civil or criminal jurisdiction, or both, is vested in the court having jurisdiction in probate matters in Colorado, Florida, Georgia, Idaho, Kentucky, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Wisconsin.

information to those actually assessing the tax to the actual assessment of the tax itself. The former method of having the probate court furnish the information and data to those charged with the assessing function exists in Delaware, Oklahoma and South Carolina.³³⁶ In nearly half the states this task is performed by or under the direction of the probate court,³³⁷ while in a few others the probate court on appeal may hear and determine all questions relating to such tax.³³⁸

VII. THE PERSONNEL OF THE PROBATE COURT

A. THE PROBATE JUDGE

The problem of probate court organization is not unrelated to the personnel of probate courts. Efficiency of operation demands competence on the part of those persons who are charged with the duty of administering the business of such courts. In the administration of decedents' estates probate courts have supervision of matters having a financial value far in excess of what is commonly believed. Justices of the peace are usually restricted to a jurisdiction of a few hundred dollars, whereas probate judges are given exclusive jurisdiction of estates that may be valued in the thousands or millions of

³³⁶ Del. Rev. Code (1935) § 138; Okla. Stat. (1941) t. 68, § 989r; S. C. Code (1942) § 2489.

³³⁷ Cal. Gen. Laws (Deering, 1937) Act 8495, §§ 15, 16; Colo. Stat. (1935) c. 85, § 59; Conn. Gen. Stat. (Supp. 1935) § 1380; Idaho Code (1932) § 14-417; Ill. Ann. Stat. (Smith-Hurd, 1940) c. 120, §§ 385, 388; Ind. Stat. (Burns, 1933) § 6-2410; Iowa Code (1939) § 7336; Md. Code (1939) art. 81, §§ 109 to 140; Minn. Stat. (1941) § 291.25; Mo. Rev. Stat. Ann. (1942) § 586; Mont. Rev. Code (1935) § 10400.13; Neb. Comp. Stat. (1929) §§ 77-2211, 77-2213; N. Y. Tax Law, §§ 249t, 249w; N. D. Comp. Laws (Supp. 1925) §§ 2346 b 26, b 25, b 38 (amended by N. D. Laws, 1927, c. 267, § 4); Ohio Gen. Code (Page, 1937) §§ 5340, 5345; Ore. Comp. Laws (1940) § 20-135; Pa. Stat. Ann. (Purdon, 1930) t. 72, § 2321; S. D. Code (1939) §§ 57.2202, 57.2305, 57.2307; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 7131; Utah Code (1943) § 80-12-15; Vt. Pub. Laws (1933) §§ 1058, 1063-1067; Wis. Stat. (1943) §§ 72.12, 72.15, 72.55.

³³⁸ Ark. Acts, 1941, Act 136, p. 333; Conn. Gen. Stat. (1930) § 1384; Ill. Ann. Stat. (Smith-Hurd, 1940) c. 120, § 388; Mass. Ann. Laws (1932) c. 65, § 27; N. Y. Tax Law, § 249x; Va. Code (1942) § 110; W. Va. Code (1937) § 862.

dollars. In approximately one-half of the states, it is possible to elect laymen to office. The probate court of one such state has been characterized as "a court that is not required to know any law and that does not know any more than the law requires."³³⁹

1. *American failures to appraise the standards for the office*

It is generally accepted that supreme court and trial judges should be capable men—"learned in the law," as is sometimes said. From the earliest time such a requirement has occupied a permanent place in the constitutions of most states. In the few states where this is not a constitutional or statutory requirement, persons elected or appointed to such positions have nevertheless been lawyers, due largely to the general feeling that such should be the case. Similar requirements were seldom made for probate judges. The reasons for this were several. In the first place, most of the work of probate judges was nonlitigious in character. It was also largely administrative. Secondly, the creation of separate probate courts in each county has given rise to a belief that each county could not support an office of probate judge with such qualifications. Furthermore, men with such qualifications have not always been available in every community. Lower requirements, shorter tenure, and smaller salaries have been the solution.³⁴⁰

In the meantime the economic and social elements of life have become more complex and technical. This is reflected in the complex provisions of wills and trusts, and the character of property ownership, all of which require the supervision of probate judges. The probate of wills, the granting of letters, and the approval of final settlements no longer constitute the bulk of their duties. A knowledge of business, investments

³³⁹ *Caron v. Old Reliable Gold Mining Co.*, 12 N. M. 211 at 226, 78 P. 63 (1904).

³⁴⁰ See Atkinson, "Organization of Probate Courts and Qualifications of Probate Judges," 23 J. AM. JUD. SOC. 93 at 94 (1939).

and accounting are a necessary part of the equipment of a modern probate judge. Complicated wills require interpretation to assure proper administration and distribution. Under many statutes the equitable jurisdiction of probate courts has been increased in response to a need.³⁴¹ Indeed our probate courts have always combined the jurisdiction and powers of the English ecclesiastical and chancery courts, but seldom have we stopped to consider the full implications of this latter jurisdiction. The modern probate judge needs to know, more than ever before, general substantive law in order to supervise the activities of fiduciaries and to insure justice to every class of beneficiaries. Furthermore the whole problem of the administration of decedents' estates needs to be viewed as one of transferring the various forms of wealth owned and controlled by the decedent to the persons ultimately entitled thereto, viz., creditors, the state (as entitled to inheritance taxes), heirs, devisees, and legatees. The task requires not merely a manual transfer, but an effective legal transfer so that there will be no cause to question its effectiveness in the future. The very fact of the nonlitigious character of the proceeding suggests that an additional competence and intelligence be exercised by those entrusted with this duty.

Another phenomenon has also occurred to increase and complicate the task of the probate judge. Guardianships and curatorships of minors, insane persons, incompetents and war veterans, adoptions, change of name, solemnization of marriages and granting of divorces in some few states, have been added gradually to that of administering decedents' estates. Each of these functions demands a penetrating and specialized understanding of human nature.³⁴² In a number of states jurisdiction over testamentary trusts, and in a few instances

³⁴¹ For a recent summary of this development see note, "Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees," 48 YALE L. J. 1273 (1939).

³⁴² See discussion under VI, *supra*.

over inter vivos and insurance trusts, has been added. Some part in the assessment of inheritance taxes has been added to probate duties in practically every state. In the midst of these added duties, no probate judge has been heard to complain of lack of sufficient work to do.

2. *Standards for the office of probate judge*

(a) *Qualifications.* The qualifications required for the office of probate judge have not been as exacting as those of general circuit or district judges. Admission to the bar or being learned in the law is a usual constitutional requirement for the latter. Legal or judicial experience is commonly an additional requirement. In the case of probate judges, however, the standards are but faintly comparable. In approximately one-half of the states³⁴³ probate judges are not required to be lawyers or to have had any legal experience. This makes it possible for laymen to administer the affairs of this office, and in many localities this is the case.³⁴⁴ It has been observed many times that a law school diploma and membership in the bar are not in themselves certifications of competence. It is equally true that the absence of these is not a mark of incompetence. The affairs of many probate courts presided over by laymen are administered with integrity and common sense. But it should be obvious that no layman, however efficient or conscientious, should be expected to appreciate and pass upon the multitudinous legal aspects involved in the administration of an estate. The fact that he can fill out the blanks in a printed form does not imply an intelligence necessary for the

³⁴³ Alabama, Colorado, Connecticut, Delaware (register of wills), Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey (surrogates' and orphans' court judges), Nebraska, New Mexico, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, and Wisconsin (in a very few counties).

³⁴⁴ As an example, see Smith, "Some Comments on the District Probate System," 7 CONN. BAR J. 56 (1933).

effective sale or lease of a piece of real estate owned by the decedent, nor the wisdom to adjudicate the conflicting claims of heirs or beneficiaries. Since many matters are not questioned at the time or subjected to the scrutiny of immediate appellate review, something close to perfection is desirable to eliminate any question of their efficacy at some distant time.

Maine, Maryland, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota and Wisconsin have seen fit to require that probate judges shall have become members of the bar as a prerequisite to holding office.³⁴⁵ In California, Nevada, Washington, Montana, Wyoming, Utah, Arizona, Iowa, Indiana, Louisiana, Virginia and North Carolina, probate matters are under the jurisdiction of the courts of general jurisdiction and hence administered by the judges of those courts. Among this group of states, all but Indiana and North Carolina make admission to the bar an essential requirement in order to qualify for this office.³⁴⁶ And in Arkansas and Mississippi, where probate matters come under the jurisdiction of chancery judges, a similar requirement is made of these judges.³⁴⁷ In Maryland, Massachusetts, New Jersey, New York and Pennsylvania, where probate courts are essentially on a par with the courts of general jurisdiction, the require-

³⁴⁵ Me. Rev. Stat. (1930) c. 75, § 3 (amended by Me. Laws, 1933, c. 62); Md. Const., art. 4, § 2; N. Y. Const., art. 6, § 19 (except as to county of Hamilton); N. D. Const., art. 4, § 111; Ohio Gen. Code (Page, 1937) § 10501-1 (or have previously served as probate judge immediately prior to election); Okla. Const., art. 7, § 11; Pa. Const., art. 5, § 22; S. D. Const., art. 5, § 25; Wis. Stat. (1943) § 253.02 (except in counties having a population of less than 14,000 or have previously served as probate judge provided the county court has no civil or criminal jurisdiction).

³⁴⁶ Ariz. Const., art. 6, § 5; Cal. Code Civ. Proc. (Deering, 1941) § 157; Cal. Const., art. 6, § 23; Iowa Code (1939) § 10815; La. Const., art. 7, § 39; Mont. Const., art. 8, § 16; Nev. Comp. Laws (Supp. 1941) § 618; Utah Const., art. 8, § 5; Va. Const., art. 6, § 96; Wash. Const., art. 4, § 17; Wyo. Const., art. 5, § 12.

³⁴⁷ Ark. Const., art. 7, § 16; Ark. Dig. Stat. (1937) § 2819; Miss. Const., art. 6, § 154.

ments for the office of probate judge are in each instance the same as for trial judges and include admission to the bar,³⁴⁸ except in Massachusetts and New Jersey where no such requirement is made for any judicial office. It should be said, however, that the long record of successful judicial administration in those states indicates the presence of other factors in producing the high quality of their judges.

To inaugurate a system in any state designed to raise the qualifications for probate judges is easier said than done. In the first place the public is not fully appreciative of the necessity of such a move, for the reasons already discussed. Secondly, there are laymen already occupying these offices, some of whom are doing a creditable job, who feel that they have a vested interest in that office as long as their constituents are willing to elect them. Such a system was proposed in Kansas in 1939 in connection with the adoption of a new probate code which had been carefully studied and drafted to accomplish a needed improvement in probate administration. In order not to oust those who had previously held the office of probate judge, it was provided that only members of the bar or past probate judges should be eligible for that office. The pressure against this reform, however, was so great as to cause its elimination from the code upon its adoption.³⁴⁹ Such a provision did find approval in Ohio and Wisconsin, however.³⁵⁰

(b) *Method of selection.* Originally surrogates or deputies held their offices by appointment from the governor. With an increasing need for permanent deputies of that kind, the office became assimilated to various other judicial offices for the purpose of selecting the occupant. In New York and

³⁴⁸ Md. Const., art. 4, § 2; N. Y. Const., art. 6, § 19; Pa. Const., art. 5, § 22.

³⁴⁹ See note to § 3 of "The Kansas Probate Code," 13 KAN. JUD. COUN. BUL. 12 (1939).

³⁵⁰ Ohio Gen. Code (Page, 1937) § 10501-1; Wis. Stat. (1943) § 253.02.

New Jersey, for example, the office of surrogate, originally appointive, later became elective. The judges of the orphans' courts in Delaware and New Jersey, and the probate judges of Massachusetts and New Hampshire are appointed by the governors of those states, as are the judges of courts of general jurisdiction.³⁵¹ Circuit judges in Virginia, who exercise most of the control over the administration of estates are chosen by the legislature;³⁵² but the clerks of the circuit courts in Virginia, who exercise a small part of probate jurisdiction, are elected locally.³⁵³ Probate judges in Rhode Island are elected by the town councils.³⁵⁴ In Connecticut, Florida and Maine probate judges are elected, whereas general trial judges are appointed by the governor.³⁵⁵ Elsewhere the office of probate judge is elective.

It would be beyond the scope of this study to discuss the relative merits of the various methods of selecting judges. The appointive method is largely confined to a few eastern states and a portion of New England. The experience of that system over a period of several generations has been found to secure the very best in judicial talent.³⁵⁶ Where general trial judges are appointed, there would seem to be no reason for employing a different method in the selection of probate judges.

³⁵¹ Del. Const., art. 4, § 3; N. J. Const., art. 7, § 2 (2); N. J. Rev. Stat. (1937) § 2:6-2; Mass. Const., c. 2, § 1, art. 9; N. H. Const., arts. 46, 73. Such appointments must be confirmed by the senate in Delaware and New Jersey. The United States district judges in the District of Columbia, who also sit in probate, are appointed by the President of the United States.

³⁵² Va. Const., art. 6, § 96.

³⁵³ Va. Const., art. 6, § 112; Va. Code (1942) § 124.

³⁵⁴ R. I. Gen. Laws (1938) c. 568, § 3.

³⁵⁵ Conn. Const., art. 5, § 3 and amend. 21; Conn. Gen. Stat. (1930) § 4764 (superior court judges are appointed by the legislature upon nomination by the governor); Fla. Const., art. 5, §§ 8, 16; Me. Const., art. 6, §§ 4, 7; Me. Rev. Stat. (1930) c. 75, § 3. Confirmation of circuit judges by the senate is required in Florida.

³⁵⁶ See references under note 357, *infra*.

(c) *Tenure*. The question of tenure, like that of qualifications for office, has received much discussion.³⁵⁷ Frequent approval of judicial officers by means of frequent elections is said to represent a democratic ideal. Longer tenure designed to secure an efficient, fearless and courageous administration of office is a contrary objective. A tenure of such duration as to attract competent, public-spirited men from a more lucrative business is of primary importance. In each state the term of office is likely to emphasize only one of these ideals or objectives.

Terms of office range all the way from one year to life tenure. Two and four-year terms are most common, though six years is not uncommon. The term of judges of the orphans' courts in Pennsylvania is ten years and in Delaware twelve years. The surrogates in New York City are elected for terms of fourteen years, whereas surrogates in other counties of New York hold office for only six years.³⁵⁸ In the District of Columbia, Massachusetts, and New Hampshire probate judges are appointed for life.³⁵⁹

These terms of office in themselves are significant only as they reflect one or more of the objectives enumerated above. The importance attributed to probate courts is to be observed by comparing the term of office of probate judges with that

³⁵⁷ See HAYNES, *THE SELECTION AND TENURE OF JUDGES* (1944); "Report of Special Committee on Judicial Selection and Tenure," 63 AM. B. A. REP. 406 (1938); Hutcheson, "Administrative Officers," 23 A.B.A.J. 930 (1937); McCormick, "Judicial Selection—Current Plans and Trends," 30 ILL. L. REV. 446 (1935); "Report of the Cincinnati Conference on the Selection and Tenure of Judges in Ohio," 8 UNIV. CIN. L. REV. 359 (1934); Freightner, "Judicial Selection and Tenure," 15 IND. L. J. 215 (1940); Wood, "Judicial Selection and Tenure," 9 ROCKY MT. L. REV. 197 (1937); Swancara, "Short Terms as Debilitators of the American Judiciary," 11 ROCKY MT. L. REV. 217 (1939); Daniels, "Selection and Tenure of Judges," 8 DUKE B. A. J. 1 (1940); Hyde, "Selection and Tenure of Judges," 27 A.B.A.J. 763 (1941).

³⁵⁸ New York County Law, § 230.

³⁵⁹ U. S. Const., art. 3, § 1 (the United States district judges for the District of Columbia serve as probate judges there; D. C. Code (1940) § 11-501; Mass. Const., c. 3, art. 1; N. H. Const., arts. 73, 78 (not beyond age 70).

of judges of courts of general jurisdiction.³⁶⁰ If the term is less, the office is less likely to attract the same calibre of talent than the latter office. In about one-third of the states the terms of both offices are the same. In Colorado, Florida, Illinois, Kentucky, Michigan, Minnesota, Missouri and Ohio

³⁶⁰ The following table will indicate the tenure of each office:

	Probate Judge	Trial Judge
Alabama	6	6
Arkansas	6 (chancery judge)	4
Colorado	4	6
Connecticut	2	8
Delaware	4 (register)	12
Florida	4	6
Georgia	4	4
Idaho	2	4
Illinois	4	6
Kansas	2	4
Kentucky	4	6
Maine	4	7
Maryland	4	15
Massachusetts	Life	Life
Michigan	4	6
Minnesota	4	6
Mississippi	4 (chancery judge)	4
Missouri	4	6
Nebraska	4	4
New Hampshire	Life	Life
New Jersey	5 (surrogate)	5
	5 (orphans' court judge)	5
New Mexico	2	6
New York	6 (14 in New York City)	14
North Carolina	4 (clerk)	8
North Dakota	2	6
Ohio	4	6
Oklahoma	2	4
Oregon	6	6
Pennsylvania	4 (register of wills)	10
Rhode Island	?	Life
South Carolina	4	4
South Dakota	2	4
Tennessee	1	8
Texas	2	4
Vermont	2	2
Virginia	8 (clerk)	8
West Virginia	6	8
Wisconsin	6	6

In Arizona, California, Indiana, Iowa, Louisiana, Montana, Nevada, Utah and Wyoming, there is identity of judges of the two courts and hence of their terms of office. Where life tenure is indicated, good behavior is implied and retirement at age seventy is sometimes provided.

the four-year term for probate judges and a six-year term for circuit or district judges is provided. In Idaho, Kansas, Oklahoma, South Dakota and Texas two and four-year terms respectively are provided; in New Mexico and North Dakota two and six years; in Maine four and seven years; in Tennessee one and eight years; in North Carolina four and eight years; in West Virginia six and eight years.

(d) *Salary.* The variations in salaries of probate judges reflect both a variation in monetary values in different localities and the importance attached to the office locally. The question of salary, like the question of tenure, is in large measure determinative of the kind of person who will seek the office.

Much variation is to be found in the prevailing practices for compensating probate judges. Some are expected to be content with fees. Some must turn over to the county or state all fees in excess of a designated amount. In either case the net amount of compensation received by a probate judge will depend on the amount of business in his jurisdiction, which in turn depends on the population and wealth. Some states have a fixed salary for probate judges throughout the state; others have adopted a variable scale depending upon the county (presumably based upon population) or upon the population of the county directly. In a few instances the amount of salaries is left to local boards;³⁶¹ or the amount of salary provided by statute may be supplemented locally where warranted by the volume of business and the population.³⁶² In certain places additional compensation is paid for additional services, such as acting as juvenile judge,³⁶³ or in connection with inheritance tax appraisements.³⁶⁴

³⁶¹ Ky. Rev. Stat. (1942) § 25.250; N. C. Gen. Stat. (1943) § 28-171; Wis. Stat. (1943) § 59.15.

³⁶² Ind. Stat. (Burns, 1933) §§ 4-3201 through 4-3219; R. I. Gen. Laws (1938) c. 574, §§ 3, 5.

³⁶³ Mich. Stat. Ann. (1943) § 27.3178(4).

³⁶⁴ Mo. Rev. Stat. Ann. (1942) § 580; Ohio Gen. Code (Page, 1937) § 5348-10a.

As in the case of tenure of office, the amount of compensation in each case is to be compared with that received by the judges of the courts of general jurisdiction.³⁶⁵ In most cases

³⁶⁵ The following table will serve as a basis for comparison:

	Probate Judge	Trial Judge
Alabama	Fees*	\$5000-8000
Arkansas	\$3600	3600
Colorado	1200-7000	5000
Connecticut	Fees	12000
Delaware	1500-4000 (register)	10000-10500
Florida	Fees	5000*
Georgia	Fees	5000
Idaho	800-2000	4000
Illinois	5000	8000
	(23000 in Cook County)	(23000 in Cook County)
Kansas	600-4000	4000
Kentucky	Fees or reasonable salary	3000
Maine	600-4000	7500
Maryland	4-15 per day	8500-11500
Massachusetts	3000-11000	12000-13000
Michigan	1000-8400	7000
Minnesota	750-7500	6000
Mississippi	5000	5000
Missouri	Fees	2000-5500*
Nebraska	800-4500	5000
New Hampshire	1500-2500	7000
New Jersey	4000-8000 (surrogate)	2700-15000
New Mexico	300-800	4500
New York	1800-15000	15000
	(23000 in N. Y. City)	(23000 in N. Y. City)
North Carolina	Fees or salary	6500
North Dakota	1500-2700	4000
Ohio	1100-10000	3000*
Oklahoma	1500-5000	4000-7200
Oregon	500-3000	5000-6500
Pennsylvania	9000-14000	9000-14000
Rhode Island	Fees or salary	9500-10000
South Carolina	Fees or salary	6750
South Dakota	700-3800	2500
Tennessee	5 per day*	5000
Texas	Fees or salary	5000-7500*
Vermont	600-2100	5000
Virginia		5400
West Virginia	2 per day	5000-7500*
Wisconsin	Fixed by county board	8000*

* Indicates that the compensation indicated may be supplemented locally.
The authors are advised that in Missouri the statutes providing for salaries of

the two salaries are subject to noticeable differences, the amount paid to probate judges being the lesser of the two. In the states where the unified court system prevails, there is identity of judges and consequently of salaries. This applies also to the judges of the orphans' courts of Delaware, New Jersey and certain counties of Pennsylvania in which the common pleas judges also preside over the orphans' courts. Only in Pennsylvania do the judges of the orphans' courts (where separate from the common pleas courts) receive the same compensation as do common pleas judges. Here the salary scale varies between \$9,000 and \$14,000, depending upon the county.³⁶⁶ In New York City and Chicago the salary of probate judges has been made to correspond to that of trial judges.³⁶⁷

B. OTHER PERSONNEL

As in courts of general jurisdiction, a clerk is a part of every probate court organization. Invariably the duties of the clerk are "clerical," i.e., to keep the records of the court proceedings and to receive and file petitions and other papers that are deposited in the court. In a few states clerks are empowered to issue orders for hearings before the court, appoint appraisers to make inventories, approve bonds, etc. Even these are hardly more than ministerial duties. It is but another step to empower the clerk to probate wills and grant letters in cases where there is no dispute as to the validity of the will

probate judges in certain counties are regarded as unconstitutional; instead the fees of office, up to the amount paid to circuit judges, are retained.

In Arizona, California, Indiana, Iowa, Louisiana, Montana, Nevada, Utah and Wyoming, there is identity of judges for the two courts and hence of their salaries.

³⁶⁶ Pa. Stat. Ann. (Purdon, 1930) t. 17, §§ 834, 836. It is not to be implied from this statement that all receive the same salary, but only that, county for county, orphans' court judges receive the same as do common pleas judges in that county.

³⁶⁷ N. Y. Jud. Law, art. 5, §§ 142, 143; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 37, § 320, c. 53, § 22.

or any contest as to who is entitled to letters. In most instances these are regarded as routine functions which any efficient and trustworthy clerk can perform. They are the substantial equivalent of those performed by the registrars in the English ecclesiastical courts. Where statutes have invested clerks of probate with powers of this kind, the judge is free to handle the more important matters of probate administration.

A study of the various statutes reveals that clerks have been given powers varying all the way from those of a clerical nature to complete judicial powers corresponding to those possessed by the judge. Under the recent Florida code the clerk may perform "all non-judicial functions which the judge may perform."³⁶⁸ The Kansas code makes the probate judge the clerk of the probate court and authorizes the appointment of assistants as deputy clerks.³⁶⁹ Statutes of every state either provide for or contemplate the performance of clerical duties in keeping the court records and files. Some authorize the clerk to issue notices or citations for hearings before the court.³⁷⁰ Others provide for the approval or fixing the amount and approval of bonds of personal representatives,³⁷¹

³⁶⁸ Fla. Stat. Ann. (1941) § 36.04.

³⁶⁹ Kan. Gen. Stat. (Supp. 1943) § 59-202. Such a statute fixes upon the probate judge the primary responsibility for keeping the records of the probate court, but permits assistants to accomplish this objective. It also makes it possible in a sparsely settled county for the judge to be his own clerk where the amount of business does not warrant the employment of a deputy clerk.

³⁷⁰ Ariz. Code (1939) § 38-2005; Cal. Prob. Code (Deering, 1941) § 1207; Conn. Gen. Stat. (1930) § 4783; Idaho Code (1932) § 15-1505; Mass. Ann. Laws (1932) c. 217, § 21; Mich. Stat. Ann. (1943) § 27.3178(12); Minn. Stat. (1941) § 525.095 (when authorized by court); Miss. Code (1942) § 1248; Mont. Rev. Code (1935) §§ 10360, 10376; Neb. Comp. Stat. (1929) § 27-544; N. J. Rev. Stat. (1937) §§ 2:31-37, 3:2-22; N. Y. Surr. Ct. Act, § 32; N. C. Gen. Stat. (1943) § 2-16; Tex. Civ. Stat. Ann. (Vernon, 1925) §§ 3306, 3333; Utah Code (1943) §§ 102-2-1, 102-14-10; Wis. Stat. (1943) § 253.27 (in judge's absence); Wyo. Rev. Stat. (1931) § 88.904.

³⁷¹ Ala. Code (1940) t. 13, § 300; Del. Rev. Code (1935) § 3813; Ind. Stat. (Burns, 1933) § 6-501; Iowa Code (1939) § 11832; Miss. Code (1942) § 1249 (order new bonds); Mont. Rev. Code (1935) § 10376 (in absence of judge from county, but subject to setting aside or modification by judge within thirty days); Utah Code (1943) § 102-2-1; Wyo. Rev. Stat. (1931) § 88-1503.

appointing appraisers for the inventory,³⁷² supervising the inventory,³⁷³ or making orders as to personal property.³⁷⁴ Of a slightly higher order are powers to hear and pass upon claims against the estate,³⁷⁵ to make decrees barring creditors,³⁷⁶ to audit accounts,³⁷⁷ and to grant discharges to personal representatives.³⁷⁸

Under the English system, as we have seen, there was a division of function between the ecclesiastical courts and chancery in the administration of decedents' estates. The power to probate wills and grant letters, exercised by the ecclesiastical courts,³⁷⁹ was essentially judicial in character even though no question was raised or contest involved. Vestiges of this dual organization exist in this country today in Delaware, the District of Columbia and Pennsylvania where separate offices of registers of wills are maintained, leaving the major task of administering estates to the orphans' or probate court.³⁸⁰ Essentially this same system prevails in Mississippi³⁸¹ and

³⁷² Mass. Ann. Laws (1932) c. 217, § 22; Miss. Code (1942) § 1248; Utah Code (1943) § 102-2-1; Va. Code (1942) § 5249; W. Va. Code (1937) § 4273.

³⁷³ Del. Rev. Code (1935) §§ 3828-3842; N. J. Rev. Stat. (1937) § 3:9.

³⁷⁴ Iowa Code (1939) § 11832; N. C. Gen. Stat. (1943) §§ 28-73 to 28-80; Utah Code (1943) § 102-2-1 (perishable property).

³⁷⁵ D. C. Code (1940) § 19-403; Md. Code (1939) art. 93, § 282; Miss. Code (1942) § 1248; Mont. Rev. Code (1935) § 10376 (in absence of judge and when not contested, but subject to setting aside or modification by judge within thirty days).

³⁷⁶ N. J. Rev. Stat. (1937) § 3:25-9.

³⁷⁷ Ala. Code (1940) t. 13, § 300; Del. Rev. Code (1935) § 3844; Iowa Code (1939) § 11832 (intermediate accounting); Me. Rev. Stat. (1930) c. 75, § 23; Miss. Code (1942) § 1249 (during vacation but subject to approval or disapproval by court); Mont. Rev. Code (1935) § 10376 (intermediate accounting, in absence of judge, but subject to setting aside or modification by judge within thirty days); N. C. Gen. Stat. (1943) §§ 2-16, 28-162; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 1861.

³⁷⁸ N. C. Gen. Stat. (1943) § 28-162; Del. Rev. Code (1935) § 3866.

³⁷⁹ See discussion under I-A, *supra*.

³⁸⁰ See discussion under III-A-1, *supra*. Del. Rev. Code (1935) §§ 3799-3876; D. C. Code (1940) § 19-403; Pa. Stat. Ann. (Purdon, 1930) t. 20, § 1981. In Pennsylvania, however, in case of a contest, the register of wills may send, or the orphans' court may order him to send, the matter to the latter court for hearing.

³⁸¹ Miss. Code (1942) §§ 1248, 1249.

Virginia³⁸² where such functions are performed by the clerk of the court instead of by a register presiding over the separate register's court. In effect the register of wills or clerk has supplanted the ecclesiastical courts in performing this function. This practice of having a judicial function performed by a ministerial officer is thus justified by history as well as by modern convenience. In the states above mentioned this power is lodged in the register or clerk, whether or not there is a contest or dispute as to the matter. Other states have been willing to entrust this function to the surrogate or clerk provided that no contest or dispute is involved. This practice prevails in New Jersey,³⁸³ Alabama,³⁸⁴ Iowa³⁸⁵ and North Carolina,³⁸⁶ and the clerk of the superior court in North Carolina is himself a court.³⁸⁷ In Delaware the deputy register of wills may exercise this power in such circumstances,³⁸⁸ whereas the register may do so irrespective of a contest.

In Maryland the register of wills exercises these prerogatives during vacation of the orphans' court.³⁸⁹ In Arkansas,³⁹⁰ Indiana,³⁹¹ Missouri³⁹² and West Virginia³⁹³ the clerk proceeds similarly during vacation, but subject to a subsequent confirmation or rejection by the court. In Montana, during any absence of the judge, whether during term time or not, the clerk possesses this power when there is no contest.³⁹⁴

In Mississippi³⁹⁵ and Utah³⁹⁶ the clerk may appoint special

³⁸² Va. Const., art. 6, § 101; Va. Code (1942) §§ 5247, 5249.

³⁸³ N. J. Rev. Stat. (1937) §§ 3:2-22, 3:7-5.1.

³⁸⁴ Ala. Code (1940) t. 13, § 300.

³⁸⁵ Iowa Code (1939) § 11832.

³⁸⁶ N. C. Gen. Stat. (1943) § 28-30.

³⁸⁷ *Edwards v. Cobb*, 95 N.C. 4 (1886).

³⁸⁸ Del. Rev. Code (1935) § 3803.

³⁸⁹ Md. Code (1939) art. 93, § 283.

³⁹⁰ Ark. Dig. Stat. (1937) § 4.

³⁹¹ Ind. Stat. (Burns, 1933) § 6-102.

³⁹² Mo. Rev. Stat. Ann. (1942) §§ 1, 2440.

³⁹³ W. Va. Code (1937) §§ 4273, 4274.

³⁹⁴ Mont. Rev. Code (1935) § 10376.

³⁹⁵ Miss. Code (1942) § 1248.

³⁹⁶ Utah Code (1943) § 102-2-1.

or temporary administrators, and in North Carolina ³⁹⁷ may revoke letters already granted. The register of wills in Pennsylvania ³⁹⁸ at any time, and the clerk in Mississippi ³⁹⁹ during vacation subject to the subsequent approval of the court, may do likewise.

This vesting in the clerk of judicial powers in probate does not stop here. In Missouri the clerk may exercise almost complete judicial power during vacation, subject to a subsequent confirmation or rejection by the court.⁴⁰⁰ In Alabama ⁴⁰¹ and North Carolina ⁴⁰² the clerk has such power at all times in the absence of contest. This means that all matters in these two states which are noncontentious in fact may be supervised by the clerk. In Delaware the register of wills regularly supervises the administration of decedents' estates except for the sale of real estate.⁴⁰³ And in certain counties of South Carolina the judge may confer complete judicial power upon the clerk.⁴⁰⁴

One further aspect of this lodgment of power in the clerk should be mentioned. Where there is a vacancy in the office of judge provision is made in New Mexico ⁴⁰⁵ and South Carolina ⁴⁰⁶ for the clerk to act as judge pro tem during such vacancy. In one respect this practice offends every principle previously advocated on the question of judicial qualifications. As an emergency measure, it may be justified on the basis that the clerk is the one person who is likely to be familiar with the affairs of the court and would likely be capable of functioning temporarily until a successor is selected and qualified.

³⁹⁷ N. C. Gen. Stat. (1943) § 2-16.

³⁹⁸ Pa. Stat. Ann. (Purdon, 1930) t. 20, § 1863 (when granted to wrong person or on probate of after-discovered will).

³⁹⁹ Miss. Code (1942) §§ 1249, 1251.

⁴⁰⁰ Mo. Rev. Stat. Ann. (1942) § 2440.

⁴⁰¹ Ala. Code (1940) t. 13, § 300.

⁴⁰² N. C. Gen. Stat. (1943) § 2-16.

⁴⁰³ Del. Rev. Code (1940) cc. 98, 99.

⁴⁰⁴ S. C. Code (1942) § 206.

⁴⁰⁵ N. M. Stat. (1941) § 16-415.

⁴⁰⁶ S. C. Code (1942) § 3642.

Thus we witness all gradations of power lodged in some inferior officer under a wide variety of circumstances. Each represents an attempt to facilitate the administration of the work of the probate court. Some may seem to vest too much power in such officer. A critical analysis should be accompanied by an examination as to how the system works in a particular locality. The qualifications and abilities of the clerk will be relevant in any individual case. Professor Atkinson points out that even routine matters may be so seriously mis-handled as to cause serious consequences.⁴⁰⁷ The right of appeal or possibility of correction by the judge is no more than a partial justification. A more fundamental solution in connection with every grant or substitution of power would be a requirement of higher qualifications on the part of the officer who is invested with the power and who will act in the first instance. Whether there is a separate judge for each county, or but one judge for several counties, the judge should assume the primary responsibility for every judicial act. If the clerk is empowered to act, either in contentious or noncontentious matters, it seems desirable that his acts should be subject to the subsequent approval or disapproval of the judge.

VIII. STANDARDS FOR AN IDEAL PROBATE COURT

By way of conclusion, we shall propose an answer to the question: What are the standards for an ideal probate court? It is readily conceded that, in any legal study covering so vast an area, the conclusions of the authors cannot be wholly objective. Necessarily, they are based, not only on the legal and factual data heretofore presented, but also on the individual background and experience of the respective writers. Nevertheless, it is believed that each conclusion hereinafter

⁴⁰⁷ Atkinson, "Organization of Probate Courts and Qualifications of Probate Judges," 23 J. AM. JUD. SOC. 93 at 96 (1939).

presented finds ample support in the materials discussed in the preceding pages.

The standards for an ideal probate court will be considered from three standpoints: first, the place of the court in the judicial organization; second, the subject matter of the jurisdiction of the court; and third, the personnel of the court.

First, the probate court should be given a place in the judicial organization fully coordinate with the trial court of general jurisdiction. Historically, that has been the course of development in England; and that is the trend in the United States. The nature of the business of the probate court, the fact that it handles estates unlimited in value and character, and that its jurisdiction may well include the specific administration and distribution of both the real and the personal property of the estate, all point to a conclusion that a superior court is needed. If such a court is set up, then appeals with trial *de novo* in the court of general jurisdiction would necessarily be eliminated. The only appeals would be to the appellate courts to which appeals are made in actions at law and suits in equity.

Second, the probate court should be the same court as the court of general jurisdiction or should be a division of it. This does not mean merely a unification of judges, such, for example, as is the plan in certain counties in Ohio and Pennsylvania. It means a unification of *courts*. Indeed, this unification should be so complete that, if, after a proceeding is begun, it is found to come under the equity or common-law jurisdiction of the court, it can be transferred to another docket of the court or to another division, without beginning the proceeding anew. Only in this way can be completely avoided the hardships incident to determining where the shadowy, marginal line of probate jurisdiction is to be drawn. The question of whether a given matter should be in equity or in probate will cease to be one in which a slight misstep on the part

of the attorney may prejudice an innocent litigant. Such a judicial organization is advocated by Dean Roscoe Pound in his recent book on *Organization of Courts*. In presenting the principles and outline for a modern court organization he suggests that there be three chief branches, a court of appeal, a superior court and a county court branch. Discussing the second of these, he says: ⁴⁰⁸

"The second branch, the Superior Court, should be given complete jurisdiction of first instance, civil and criminal, the civil jurisdiction, for reasons set forth in preceding chapters, to include law, equity, and probate. Certainly there should be no mandatory setting off of these types of cases to separate divisions. But the organization of this branch should be so flexible that if experience showed good reason for setting off some or all of them in that way, it could be done by rule of court, or more simply by assigning cases to judges in such a way as to effect a practical segregation, which, however, could be changed or revoked later if experience or changed conditions made such action advisable."

This type of judicial organization can be adapted to operate both in metropolitan areas and in rural districts. Without doubt, in large cities there will be a number of judges selected for the trial courts of general jurisdiction. Statutory provisions should set up some sort of judicial council, or other administrative machinery, whereby these judges can be assigned to particular specialized matters. Just as some may be assigned solely to criminal matters or to domestic relations cases, so others should be assigned to the probate work of the court. This is in fact done in certain metropolitan areas in California.⁴⁰⁹ But the writers would advocate going even a step farther than does the California system. In that state,

⁴⁰⁸ POUND, *ORGANIZATION OF COURTS* (1940) 281.

⁴⁰⁹ Cal. Code Civ. Proc. (Deering, 1941) §§ 67, 67a; Rules of Superior Court of California (as amended to July 1, 1943), rules 24 and 25, LARMAC, *CONSOLIDATED INDEX TO CONSTITUTION AND LAWS OF CALIFORNIA* (1943) 1788-1791.

the superior court, when it hears a probate matter, is the "superior court sitting in probate." While it is not another court, still its jurisdiction is so different that a proceeding cannot ordinarily be transferred from its probate to its civil jurisdiction, but would have to be started anew. The probate jurisdiction of the trial courts in the state of Washington is to be preferred in this particular. In that state, as has been seen, there is not a court "sitting in probate." It is all a part of the same jurisdiction whether the subject matter be civil or probate.

In rural areas of sparse population objection may well be raised to a separate judge of probate if he is to have the same qualifications and salary as the judge of the trial court of general jurisdiction. It may be felt that the small amount of probate business does not justify such an expensive court. But when the probate jurisdiction is added to that of the civil and criminal jurisdiction of the trial court, not only is this objection eliminated, but the advantages of a unified court are also obtained.

If the objection is made that in many states the unit for the trial court is a district which may include several counties and that the emergency character of some kinds of probate business may well require a judge in each county, the answer is that the trial judge may be assigned to a circuit which includes a number of counties; but clerks may be elected or appointed in each county to take care of routine business under the supervision of the judge, and, of course, the court can sit in each county.⁴¹⁰ This is, in fact, the system adopted in Montana and in some other states.

⁴¹⁰ It may be added that, not only should there be a clerk in each county, but the court should be open for business at all reasonable times. The tendency of modern legislation is to dispense with terms of court for probate business. See Kan. Gen. Stat. (Supp. 1943) § 59-211: "There shall be no terms of the probate court. It shall be open for the transaction of business at the county seat at all reasonable hours. Hearings may be had at such other places in the county as the court may deem advisable."

What should be included in the subject matter of the jurisdiction of the ideal probate court? Certainly if we have the unified court, then this question becomes less important. If it is the same judge or a division of the same court, it becomes much less important whether he is sitting in equity or in probate as to the particular question before him. Nevertheless, in the interests of efficiency and simplicity of administration, it would seem that all matters directly connected with the administration of the decedent's estate should be within the probate division of the court. Such has been the definite trend of legislation in the United States even where probate courts are entirely separate from the trial courts of general jurisdiction. And it is believed that that trend is sound. In that particular the English judicial system might profit by imitating some American models.

As to matters other than decedents' estates, it is clear that the probate jurisdiction should include guardianships and matters closely related, such as adoptions. But this jurisdiction should not be weighted down with all sorts of irrelevant administrative matters, such as are sometimes assigned to county courts which sit in probate matters.

Third, what can be said as to the personnel of the court? Obviously, if the judge is a judicial officer of the trial court of general jurisdiction, he should have, and will have, the same qualifications as that judge, with a corresponding tenure and salary. But even if that were not the case, the nature of probate jurisdiction calls for such qualifications. He should be a member of the bar, preferably with experience in practice or on the bench.

As to other officers of the court, such as clerks or registers, there should be an adequate number of well qualified persons. Should they have judicial powers? Considering the various patterns in the statutes heretofore analyzed, we find three possible answers. First, in some states such officers do have

judicial powers; in other words, for some purposes, they function as courts. Second, in other states, they have no judicial powers whatever, but can perform only ministerial acts. In still a third group of states, the clerk or register acts in certain matters either subject to the subsequent approval of the judge or subject to the lack of disapproval of the judge within a specified period.

[It would seem that, if, as is herein advocated, a noncontentious, summary procedure is permitted, efficiency would require that some judicial powers be given to the clerk or register in these matters. However, the judge should be held to strict accountability for these acts. The jurisdiction described in the third group of states is believed to be preferable. But it should be limited to noncontentious matters. If the judge disapproves of the act of the clerk, or if the matter is contentious, then it should come before the judge in person.

That these conclusions follow as a matter of course from the legal and factual data herein presented can scarcely be denied. That they have seldom been reached by legislative bodies in America is believed to be due, not to the uncertainty of the conclusions, but to the fact that, until very recently, the realm of probate law has been one outside the sphere of scholarly investigation or legislative reform.⁴¹¹ And this legal structure for more than a century has been added to or amended, bit by bit, to accomplish the specific, narrow objectives of particular

⁴¹¹ A recent example of a scientific and comprehensive legislative approach to probate reform is found in New Jersey. At its 1944 session the New Jersey legislature agreed upon a revised constitution for that state which is to be submitted to the people at the general election this year. The proposed constitution provides for a superior court having complete general original jurisdiction in all cases, and divided into two sections: (1) a law section to exercise civil and criminal jurisdiction at law, and matrimonial jurisdiction in certain cases; and (2) an equity and probate section to exercise all other jurisdiction. Further provision is made that either section shall exercise the jurisdiction of the other when the ends of justice so require. Proposed N. J. Rev. Const. (1944) art. 5, § 3, pars. 2-3. [Since the publication of this monograph the proposed New Jersey constitution was defeated in a popular referendum.]

legislators or of a few of their constituency, without any consideration of the historical development or of the proper functions of probate courts and probate legislation as a whole. If these pages have contributed something toward a broad and comprehensive view of the problems of probate court organization they will not have been written in vain.

The Administration of a Decedent's Estate as a Proceeding in Rem* ·

Lewis M. Simes

FOR over a century American courts and text writers have referred to the administration of a decedent's estate as a proceeding in rem. Indeed, it has recently been asserted that a probate proceeding is "universally recognized as a proceeding in rem."¹ But more cautious persons have been content to suggest that it is at least "quasi in rem,"² or have carefully skirted the fog which is wont to envelop this area of the law and given it silent treatment. Thus, the American Law Institute *Restatement of the Law of Judgments* (which purports to include the law of probate decrees³) gives examples of judgments in rem,⁴ and mentions in that connection judgments of a court of admiralty, judgments under land registration statutes and proceedings for forfeiture of things used in violation of law, but does not refer to probate decrees. At a later point, after positively asserting that an admiralty proceeding to enforce a maritime lien on a vessel, or a proceeding for a registration of title to land is in rem, it continues with this guarded observation:⁵ "So, also,

* Originally printed as an article in 43 Mich. L. Rev. 675 (1945).

¹ Hopkins, "The Extraterritorial Effect of Probate Decrees," 53 YALE L. J. 221 at 225 (1944). A similar statement is made in Carey, "A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedents' Estates," 24 ILL. L. REV. 44 at 49 (1929).

² "The administration of an estate under the probate jurisdiction of a court, which involves the appointment of an administrator and culminates in a final decree of distribution, is a proceeding in rem, or, as said by some, quasi in rem." Carter v. Frahm, 31 S. D. 379 at 392, 141 N. W. 370 (1913). And see Campbell v. Drais, 125 Cal. 253 at 258, 57 P. 994 (1899).

³ "The Restatement of this Subject deals also with the determination of the court in other judicial proceedings, such as proceedings in admiralty, or in probate, or for divorce." RESTATEMENT, JUDGMENTS (1942) 3.

⁴ RESTATEMENT, JUDGMENTS (1942) 6, 7.

⁵ RESTATEMENT, JUDGMENTS (1942) § 32.

probate courts, acting within their jurisdiction, can give judgments in rem, binding on all the world."

In view of the uncertainty which still exists, this paper proposes to consider just what is meant by the proposition that the administration of a decedent's estate is a proceeding in rem. Since the *Restatement of Judgments* is believed to be the only satisfactory rationalization of our law of res judicata, and since the writer has to some extent followed its approach to problems in this field of the law, this discussion may be regarded as a kind of unsolicited appendix to that *Restatement*. Moreover, like the *Restatement of Judgments*, this paper deals primarily with the effect of decrees in the state in which they are rendered. While decisions involving problems in the field of conflict of laws as to the effect of foreign probate decrees cannot be ignored, this discussion does not address itself to an analysis of those problems. Indeed, it may be suggested that there has been, on the part of some writers and a few courts, altogether too much of a desire to shape the concept of a probate proceeding in rem with a view to permitting a court to administer assets outside the jurisdiction rather than for the purpose of attaining the simpler objective of avoiding a trial of the same cause or issue twice. In other words, it is believed that the legal implications which arise from affixing the in rem label to probate proceedings should be worked out primarily in accordance with the principles of res judicata and not distorted to enable the court to exercise jurisdiction over assets in another state, however laudable it may be to accomplish that result.

This discussion will be directed to the consideration of three questions. First, from a consideration of the American decisions on the subject, can it be concluded that the administration of a decedent's estate is a proceeding in rem? Second, if it is an in rem proceeding, what notice is necessary to prevent collateral attack on decrees rendered as a part of the proceeding? Third, what persons and what things are bound by a

valid decree in rem rendered in a proceeding for the administration of a decedent's estate?

I. ARE PROCEEDINGS FOR ADMINISTRATION IN REM?

It must be recognized that the proceeding in rem is but a procedural device arising from judicial necessity, and that, whatever form it may take, persons and not things are the interested parties. Nevertheless, if we are to determine whether probate proceedings are in rem, we must know what is meant by a proceeding in rem. For this purpose we can do no better than to quote from the *Restatement of Judgments*:⁶

"Where a thing is subject to the power of a State, a proceeding may be brought to affect the interests in the thing not merely of particular persons but of all persons in the world. Such a proceeding is called a proceeding in rem, as distinguished from a proceeding brought to affect the interests in the thing of particular persons only, which is called a proceeding quasi in rem. . . .

"Proceedings quasi in rem are of two types. In the first type the plaintiff asserts an interest in property and seeks to have his interest established as against the claim of a designated person or designated persons. . . .

"In the second type of proceeding quasi in rem the plaintiff does not assert that he has an interest in the property, but asserts a claim against the defendant personally, and seeks to compel to the satisfaction of his claim the application of property of the defendant, by attachment or garnishment."

These statements make it clear that a proceeding in rem has at least two characteristics: first, it concerns a thing within the jurisdiction of the court; and, second, its decrees determine interests of all persons in the thing. If the proceeding is quasi in rem, the first characteristic is present; but, unlike the proceeding in rem, its decrees determine only the interests of one or more specific parties in the thing.

⁶ RESTATEMENT, JUDGMENTS (1942) § 32, comment a.

Before applying these definitions to the American case law on the question of the *in rem* character of probate proceedings, it is desirable to consider briefly just what was the character of English proceedings relative to the administration of decedents' estates. Nowhere in the early English cases has been found a categorical statement that administration proceedings in ecclesiastical courts were *in rem*. However, in the first edition of Smith's *Leading Cases*, the author, in commenting on the *Duchess of Kingston's Case*, makes this observation:⁷

"Judgments of the *courts ecclesiastical* are of two sorts—*in rem* and *inter partes*. A grant of *probate* or *administration* is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him. Accordingly, such grant of probate or administration is conclusive against all the world."

Attention should also be called to the elaborate review of the English authorities in Hargrave's *Law Tracts*,⁸ in which the author seeks to show that a grant of administration or the probate of a will is conclusive in the courts of law and equity. He does not state that it is *in rem*, but his whole argument implies that.

It must, however, be conceded that administration in equity⁹ could scarcely have been thought of as *in rem* in view of the fact that courts of equity are almost universally regarded as acting *in personam*. Since there was no probate of wills of land in England prior to the middle of the nineteenth century, it is clear that the actions commonly brought to test the validity of devises,—namely, trespass or ejectment—were *in personam*. Doubtless, also actions in courts of law

⁷ 30 LAW LIBRARY (1837-1840) 110. This statement also appears in later editions of the work and is cited by American courts.

⁸ HARGRAVE'S LAW TRACTS (1787) 457.

⁹ In general as to the administration of a decedent's estate in equity, see Atkinson, "Brief History of English Testamentary Jurisdiction," 8 MO. L. REV. 107 at 118 (1943); LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) arts. VI and VII; MAITLAND, EQUITY (rev. ed. 1936) 248-257.

against the executor or administrator in his representative capacity to satisfy contract claims against the decedent were in personam.

In order to give any adequate picture of the American case law on the question of whether a proceeding to administer a decedent's estate is in rem, it is necessary to consider one by one the various important decrees normally rendered in the course of an administration. Thus the modern American probate court may, in the course of the administration, admit a will to probate, grant letters to personal representatives, sell real or personal property to pay debts or legacies, pass upon creditors' claims, settle the accounts of the personal representative, decree distribution of the estate, and perhaps render final orders as to still other matters. Hence, it is entirely possible that some of these decrees may have strictly in rem operation and that others do not.

That the order admitting the will to probate is in rem is universally concluded.¹⁰ This question has arisen in a variety

¹⁰ *Hall's Heirs v. Hall*, 47 Ala. 290 (1872); *Dickey v. Vann*, 81 Ala. 425, 8 So. 195 (1886); *McCann v. Ellis*, 172 Ala. 60, 55 So. 303 (1911); *Griffin v. Milligan*, 177 Ala. 57, 58 So. 257 (1912); *Estate of Carpenter*, 127 Cal. 582, 60 P. 162 (1900); *Estate of Relph*, 192 Cal. 451, 221 P. 361 (1923); *Farmers' & Merchants' Nat. Bank of Los Angeles v. Superior Court* (Cal. App. 1944) 148 P. (2d) 445, aff'd on rehearing, 150 P. (2d) 241; *Torrey v. Bruner*, 60 Fla. 365, 53 So. 337 (1910); *In re Will of Storey*, 20 Ill. App. 183 (1886); *Crippen v. Dexter*, 79 Mass. 330 (1859); *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265 (1886); *Bonnemort v. Gill*, 167 Mass. 338, 45 N. E. 768 (1897); *In re Estate of Meredith*, 275 Mich. 278, 266 N. W. 351 (1936); *Woodville v. Pizzati*, 119 Miss. 442, 81 So. 127 (1919); *State ex rel. Mitchell v. Gideon*, 215 Mo. App. 46, 237 S. W. 220 (1922); *State ex rel. Ruef v. District Court*, 34 Mont. 96, 85 P. 866 (1906); *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902 (1913); *Bogardus v. Clark*, 4 Paige (N. Y.) 623 (1834); *Matter of Horton*, 217 N. Y. 363, 111 N. E. 1066 (1916); *In re Wohlgenuth*, 110 App. Div. 644, 97 N. Y. S. 367 (1906); *In re Eno's Will*, 94 Misc. 100, 157 N. Y. S. 553 (1916), aff'd 172 App. Div. 124, 158 N. Y. S. 234 (1916); *Olney v. Angell*, 5 R. I. 198 (1858); *Saunders v. Link*, 114 Va. 285, 76 S. E. 327 (1912); *Culpeper Natl. Bank v. Morris*, 168 Va. 379, 191 S. E. 764 (1937); *Will of Dardis*, 135 Wis. 457, 115 N. W. 332 (1908); *Tompkins v. Tompkins*, 24 Fed. Cas. No. 14,091, 1 Story 547 (1841); *Broderick's Will*, 21 Wall. (88 U. S.) 503 (1874). See also elaborate dicta in *Deslonde v. Darrington's Heirs*, 29 Ala. 92 (1856); *State v. McGlynn*, 20 Cal. 233 at 269 (1862); *Woodruff v. Taylor*, 20 Vt. 65 (1847).

of forms where an heir or devisee who had no notice of the proceeding came in subsequently and sought to attack the decree collaterally in another proceeding in the same state. Invariably he has been unsuccessful if jurisdictional requirements of notice and a fair hearing are complied with.¹¹ It should be observed that, since in nearly all states probate is now necessary for a devise of land, the decree has in rem operation with respect to dispositions of land as well as of personality.

A little more difficulty has been experienced in the case of the will contest in some jurisdictions, although the conclusion has generally been the same.¹² Thus in some jurisdictions statutes permit probate or contest in chancery, and it has been argued that, since equity acts in personam, the proceeding cannot be in rem. But the courts have replied that this is a statutory proceeding; and while it happens to be in a court of equity, for purposes of the operation and binding effect of the decree, it is in rem.¹³ At one time American statutes were in force permitting a contest to be effected by asking the court to direct the framing of an issue *devisavit vel non* to be sent to a court of law for trial before a jury.¹⁴ Indeed, this pro-

¹¹ Of course, other jurisdictional requirements should be complied with also. And if the person whose estate is being administered is not dead, the entire proceeding is void because the requirements of due process are not complied with as to him, since he is not a party to the proceeding and cannot be a party. *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894).

¹² *McCann v. Ellis*, 172 Ala. 60, 55 So. 303 (1911); *In re will of Storey*, 20 Ill. App. 183 (1886); *People ex rel. Frazer v. Wayne Circuit Judge*, 39 Mich. 198 (1878); *In re estate of Sweeney*, 94 Neb. 834, 144 N. W. 902 (1913); *Hutson v. Sawyer*, 104 N. C. 1, 10 S. E. 85 (1889); *Taylor v. Dinsmore*, (Tex. Civ. App. 1938) 114 S. W. (2d) 269. See also cases cited in notes 13 to 22 inclusive, *infra*. Dictum: *Estate of Carpenter*, 127 Cal. 582, 60 P. 162 (1900). Contra, on statute then existing: *McArthur v. Scott*, 113 U. S. 340, 5 S. Ct. 652 (1885).

¹³ *Ex parte Walter*, 202 Ala. 281, 80 So. 119 (1918); *Woodville v. Pizzati*, 119 Miss. 442, 81 So. 127 (1919); *Connolly v. Connolly*, 32 Gratt. (73 Va.) 657 at 664 (1880); *Dower v. Seeds*, 28 W. Va. 113 at 134 (1886); *Dower v. Church*, 21 W. Va. 23 (1882).

¹⁴ For a description of the practice in Virginia and a comparison with the English practice, see *Wills v. Spraggins*, 3 Gratt. (44 Va.) 555 (1847).

cedure is not entirely obsolete at the present time.¹⁵ Now, if this were regarded as analogous to the English chancery practice of ordering an heir or devisee to go over into a court of law and frame an issue of *devisavit vel non* to be tried in an action of trespass or ejectment,¹⁶ the courts would have been forced to conclude that it was an in personam proceeding. But, again, obvious considerations of public policy and good sense caused them to conclude that this too was a proceeding in rem.¹⁷ In some states, such as California, statutes expressly provide that, in a contest, the contestant shall be plaintiff and the proponent defendant.¹⁸ From this it has been argued that such statutes make the proceeding adversary and hence in personam; that an in rem proceeding is necessarily ex parte. But this argument has not been accepted by the courts.¹⁹ Indeed, it should be observed that because some of the parties to a proceeding are adverse to others does not prevent it from being in rem. It may be that the designation of certain persons as plaintiffs or defendants in some statutes gives such persons a slightly different status as to burden of proof and perhaps as to some other procedural matters.²⁰ But doubtless all persons in the world who have an interest in the estate

¹⁵ See, for example, Pa. Stat. Ann (Purdon, Supp. 1943) t. 20, § 1961.

¹⁶ For a brief description of this practice in England, see 2 STORY, EQUITY JURISPRUDENCE (1st ed. 1836) 671.

¹⁷ Wills v. Spraggins, 3 Gratt. (44 Va.) 555 (1847).

¹⁸ Cal. Prob. Code (Deering, 1941) § 371.

¹⁹ Estate of Relph, 192 Cal. 451, 221 P. 361 (1923). See particularly the discussion at page 458 of the California report.

²⁰ In Estate of Relph, 192 Cal. 451 at 459, 460, 221 P. 361 (1923), the court said:

"The contest of a will, on the other hand, while a proceeding *in rem*, is at the same time an adversary proceeding, the parties to which consist, on the one hand, of those persons interested in the estate who have appeared and filed written grounds of opposition to the probate of the will (commonly referred to as the contest); and, on the other hand, those persons interested in the will who have appeared and filed written answer thereto. . . .

"In the proceeding upon the contest of the will the petitioner for the probate thereof is not even a necessary party litigant thereto." But compare Estate of Carpenter, 127 Cal. 582, 60 P. 162 (1900), denying the settlement of a contest by arbitration because of the fact that the proceeding is in rem.

as successors to the decedent are potential if not actual parties, may appear and be heard, and are bound by the decree.

Provisions in will contest statutes extending the time within which contests may be brought for persons under a disability have caused some difficulty. The question is asked: If the order admitting the will to probate is set aside only as to the person under a disability, but not as to other persons, how can it be in rem, for a decree in rem is said to bind all the world? Sometimes it has been held that the decree can be set aside as to the persons under a disability and not as to others;²¹ sometimes that it must be set aside, if at all, as to all persons.²² But whichever view is taken (and this would seem to be purely a matter of statutory interpretation) it would not detract from the essentially in rem character of the decree. For it can be binding as to all the world except the incompetents, and still no difficulty should be experienced in calling it in rem.

There is little dissent from the proposition that the order appointing the executor or administrator is in rem.²³ That is to say, it is not subject to collateral attack in another proceeding on the ground of lack of notice, if the requirements of notice and a fair hearing for a proceeding in rem have been complied with. A curious Alabama decision²⁴ provides almost the only dissent from this proposition. In that case it was held that, although in respect to the grant of letters the

²¹ *Security Trust & Savings Bank v. Superior Court*, 21 Cal. App. (2d) 551, 69 P. (2d) 921 (1937); *Spencer v. Spencer*, 31 Mont. 631, 79 P. 320 (1904).

²² *McCann v. Ellis*, 172 Ala. 60, 55 So. 303 (1911).

²³ *Matter of Olcese*, 210 Cal. 262, 291 P. 193 (1930); *Coca-Cola International Corp. v. New York Trust Co.*, 22 Del. Ch. 344, 2 A. (2d) 290 (1938) (dictum); *Gibbs v. Beckett*, 229 Iowa 619, 295 N. W. 165 (1940); *Anderson v. Qualey*, 216 Mass. 106, 103 N. E. 90 (1913); *Fridley v. Farmers' & Mechanics' Savings Bank*, 136 Minn. 333, 162 N. W. 454 (1917); *State ex rel. Gott v. Fidelity & Deposit Co.*, 317 Mo. 1078, 298 S. W. 83 (1927); *Quindort's Admr. v. Pergeau*, 18 N. J. Eq. 472 (1867); *In re Reilly's Estate*, 165 Misc. 214, 300 N. Y. S. 1285 (1937); *Denny v. Searles*, 150 Va. 701, 143 S. E. 484 (1928).

²⁴ *White v. Hill*, 176 Ala. 480, 58 So. 444 (1912).

proceeding was in rem, it was in personam as to the determination of the person who was nearest of kin and thus entitled to first consideration as an appointee.

Decisions are also numerous to the effect that the final decree of distribution has in rem operation, and cannot be collaterally attacked merely because an interested party was not served or did not have notice.²⁵ Here the significance of the decree itself varies considerably from state to state. Thus in many jurisdictions there is a final decree specifically declaring what interests the distributees take in personalty and in realty. In others the decree of distribution does not deal with real estate, but title is regarded as passing to the heir or devisee by virtue of the statute of descent or by the will. In some states the personal representative's distribution of per-

²⁵ *Wm. Hill Co. v. Lawler*, 116 Cal. 359, 48 P. 323 (1897); *Estate of Ross*, 185 Cal. 8, 195 P. 674 (1921); *Edlund v. Superior Ct.*, 209 Cal. 690, 289 P. 841 (1930); *Estate of Madsen*, 31 Cal. App. (2d) 240, 87 P. (2d) 903 (1939); *Connolly v. Probate Ct.*, 25 Idaho 35, 136 P. 205 (1913); *In re Estate of Togneri*, 296 Ill. App. 33, 15 N. E. (2d) 908 (1938); *Loring v. Steinman*, 1 Metc. (42 Mass.) 204 (1840); *Cleaveland v. Draper*, 194 Mass. 118, 80 N. E. 227 (1907); *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99 (1895); *In re Estate of Eklund*, 174 Minn. 28, 218 N. W. 235 (1928); *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861 (1917); *Starkey v. Kingsley*, 69 N. H. 293, 39 A. 1017 (1897); *Exton v. Zule*, 14 N. J. Eq. 501 (1861); *In re Estate of Riley*, 92 N. J. Eq. 567, 113 A. 485 (1921); *Roseman v. Fidelity & Deposit Co. of Md.*, 154 Misc. 320, 277 N. Y. S. 471 (City Court of New York, 1935); *Barrette v. Whitney*, 36 Utah 574, 106 P. 522 (1909); *Carter v. Skillman*, 108 Va. 204, 60 S. E. 775 (1908); *Krohn v. Hirsch*, 81 Wash. 222, 142 P. 647 (1914); *In re Nilson's Estate*, 109 Wash. 127, 186 P. 268 (1919); *Farley v. Davis*, 10 Wash. (2d) 62, 116 P. (2d) 263 (1941); *Hendricksen v. Baker-Boyer Nat. Bank (C. C. A. 9th, 1944)* 139 F. (2d) 877; *Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1 (1907); *Christianson v. King County*, 239 U. S. 356, 36 S. Ct. 114 (1915).

See also *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (1938); *Shriver v. State*, 65 Md. 278, 4 A. 679 (1886); *State ex rel. Gott v. Fidelity & Deposit Co.*, 317 Mo. 1078, 298 S. W. 83 (1927); *Wolff v. Rager*, 326 Mo. 222, 30 S. W. (2d) 1005 (1930) (probate proceedings said to be not strictly in rem, but somewhat in the nature of proceedings in rem).

Dictum: *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370 (1913) (said to be in rem or quasi in rem).

Contra: *Wood v. Myrick*, 16 Minn. 494 (1871) (but see later cases reversing this holding, cited in this note); *First Nat. Bank v. Chandler*, 133 N. J. Eq. 335, 32 A. (2d) 455 (1943) (decided on basis of statute requiring notice); *Ruth v. Oberbrunner*, 40 Wis. 238 at 267 (1876) (notice held to be jurisdictional).

sonalty may be adjudicated by the final accounting, so that, in effect, the final accounting determines the distribution. But whatever the subject matter or character of the decree of distribution, its in rem operation is generally conceded.

The decree settling the account of the personal representative has been held to be in rem.²⁶ Apparently by that is meant that, assuming jurisdictional requirements for an in rem proceeding have been met, it is not subject to collateral attack by a person interested in the estate of the decedent in so far as it determines what the personal representative was justified in taking out of the estate and appropriating for the various purposes stated in the account. But suppose the executor's account is short and the decree surcharges him and directs him to make good a stated amount from his own assets. While under the old law an action by an administrator de bonis non to charge his predecessor probably could not be brought in the probate proceeding but had to be initiated by creditors and distributees in a separate action,²⁷ in many jurisdictions today this can be done in the probate proceeding.²⁸ If it is done in this way, is it in rem? And if it is in rem, what does that mean? In the case of *Michigan Trust Co. v. Ferry*,²⁹ where such a surcharge was made in the Michigan probate court, and an action was brought against the executor in Utah on the judgment, the court proceeded on the theory that it was a decree in personam to the extent that requirements of notice for an in personam proceeding were necessary to entitle it to recognition in Utah. Without doubt, this was a correct

²⁶ *Horn v. Cornwall*, (Idaho 1943) 139 P. (2d) 757; *In re Anderson's Estate*, 157 Ore. 365, 71 P. (2d) 1013 (1937) (dictum). But compare *In re Killian*, 172 N. Y. 547, 65 N. E. 561, 63 L. R. A. 95 (1902), where a statutory requirement of notice for a settlement of accounts was held to be jurisdictional, and therefore the decree was void as to interested parties who did not receive the statutory notice.

²⁷ See 3 WOERNER, ADMINISTRATION (3d ed. 1923) § 536.

²⁸ See ATKINSON, WILLS (1937) 610; *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 33 S. Ct. 550 (1912).

²⁹ 228 U. S. 346 (1912).

conclusion in so far as the facts of that case are concerned. But, did it not have in rem operation to the extent that a devisee who did not have personal service in Michigan could not have subjected it to collateral attack in another Michigan proceeding. In other words, did it not bind all other persons interested in the estate in so far as it decided that this amount, and no more, should go into the estate, though it had purely in personam operation as to the executor's duty to pay a sum of money?

Next to decisions concerned with decrees in matters of probate and contest and with decrees of distribution, perhaps the largest number of cases involve proceedings to sell land in connection with the administration of a decedent's estate. Here the holdings are conflicting, although the weight of authority is to the effect that decrees with respect to the sale are in rem.³⁰ Of course, under English law the land of the

³⁰ The following are to the effect that the proceeding is in rem: *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708 (1840); *Perkins' Exrs. v. Winter's Admrs.*, 7 Ala. 855 (1845); *Saltonstall v. Riley*, 28 Ala. 164 (1856); *Satcher v. Satcher's Admr.*, 41 Ala. 26 (1867); *Lyons v. Hamner*, 84 Ala. 197, 4 So. 26 (1887); *Neville v. Kenny*, 125 Ala. 149, 28 So. 452 (1899); *Sturdy v. Jacobway*, 19 Ark. 499 (1858); *Montgomery v. Johnson*, 31 Ark. 74 (1876); *Roundtree v. Montague*, 30 Cal. App. 170, 157 P. 623 (1916); *Good v. Norley*, 28 Iowa 188 (1869) (equally divided court); *McClay v. Foxworthy*, 18 Neb. 295, 25 N. W. 86 (1885); *Brusha v. Phipps*, 86 Neb. 822, 126 N. W. 856 (1910); *Sheldon v. Newton*, 3 Ohio St. 494 (1854); *Benson v. Cilley*, 8 Ohio St. 604 (1858); *McPherson v. Cunliff*, 11 Serg. & R. (Pa.) 422 (1824); *Heath v. Layne*, 62 Tex. 686 (1884); *Ryan v. Ferguson*, 3 Wash. 356, 28 P. 910 (1891); *Grignon's Lessee v. Astor*, 2 How. (43 U. S.) 319 (1844); *Magnolia Petroleum Co. v. Mayer* (C. C. A. 10th, 1932) 58 F. (2d) 48.

Contra: *Mickel v. Hicks*, 19 Kan. 578 (1878); *Seal v. Banes*, 168 Okla. 550, 35 P. (2d) 704 (1934); *Stadelman v. Miner*, 83 Ore. 348, 155 P. 708, 163 P. 585, 163 P. 983 (1917) (on rehearing the court determined that the requirement of notice had been sufficiently complied with so that no collateral attack would be permitted).

There are also several cases in which it was determined that a statutory requirement of notice was jurisdictional and that since it was not complied with, the sale was void, but it is not asserted that the proceeding was not in rem. See *Dorrance v. Raynsford*, 67 Conn. 1, 34 A. 706 (1895); *French v. Hoyt*, 6 N. H. 370 (1833); *Jenkins v. Young*, 35 Hun. (42 N. Y.) 569 (1885). And see VANFLEET, *COLLATERAL ATTACK ON JUDICIAL PROCEEDINGS* (1892) § 406. But these cases would seem to prove little; though the orders with respect to the

decedent was not subject to the jurisdiction of the ecclesiastical court. If it was reached at all to satisfy the debts of the decedent, it was reached in equity. The theory of the proceeding was that, since title to the land passed to the heir or devisee at the instant of the decedent's death, chancery was proceeding against such person to appropriate his interest to the payment of the debt.³¹ It is still the rule in this country that title to land passes to the heir or devisee at the moment the decedent dies. In some jurisdictions a proceeding to sell land to pay debts is an independent proceeding by the personal representative against the other interested parties.³²

In *McPherson v. Cunliff*,³³ one of the earliest cases on the subject of the *in rem* character of probate proceedings, the Pennsylvania Supreme Court decided that the decree of the orphans' court could not be attacked collaterally in an action of ejectment by one claiming to derive title from one of the heirs who resided in Ireland and who evidently had no notice of the administration sale. While there were other circumstances which might have been relied on to reach this conclusion, the court based its decision squarely on the *in rem* character of the decree, when it said:³⁴

" . . . It is a proceeding purely *in rem* against the estate of the intestate, and not *in personam*. So much is it a proceeding against his estate, that it overrules the lien of a judgment. The estate was condemned to a sale, and may well be compared to a condemnation of goods by a court of exchequer, whose condemnation is final, in an action brought to try the right of the goods."

sale of land are *in rem*, a failure to comply with statutory requirements may render them void. See *Robertson v. Bradford*, 70 Ala. 385 (1881).

The two recent cases, hereafter discussed, to the effect that the proceeding for the sale of land is not strictly *in rem* but quasi *in rem* should also be noted.

³¹ LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION (2d ed. 1908) 144.

³² See, for example, Neb. Comp. Stat. (1929) §§ 30-1101 to 30-1125.

³³ 11 Serg. & R. (Pa.) 422 (1824).

³⁴ At page 430.

A few recent decisions contrary to the trend of modern authority should be noted. In Montana,³⁵ and subsequently in Idaho,³⁶ it has been determined that a proceeding to sell the real estate of a decedent is not strictly in rem but is quasi in rem. What these courts actually held was that the proceeding for sale was void as to heirs or devisees who were not served as provided by statute or who did not appear. The Idaho decision is to the effect that the sale was binding on heirs who appeared or were served. In both cases it appeared that the statute required personal service or service by publication of the order to show cause. In both cases it appeared that neither of these requirements was complied with. In a recent Oklahoma case³⁷ it was decided that minor heirs residing in the county who were not personally served were not bound by a proceeding to sell real estate. A statute required that notice be personally served on heirs residing within the county. While conceding that other probate proceedings are in rem, the court adhered to the view that this proceeding was in personam. It would be easier to state the effect of these decisions, if we could determine what would have been held if, in Montana or Idaho, the statutory requirement for publication of notice had been complied with, or if, in Oklahoma, all heirs within the county had been personally served. It would be perfectly possible to say that the decree would then have in rem operation and that it would bind all other persons in or out of the state whether they were personally served or not. It is not clear whether the Montana and Idaho courts, in describing the proceeding as quasi in rem, meant to use this term in the sense in which it is used in the *Restatement of Judgments*. But if they did, it would seem that such a doctrine would be most unsatisfactory as applied to sales of a decedent's

³⁵ *Lamont v. Vinger*, 61 Mont. 530, 202 P. 769 (1921). See also 2 BLACK, JUDGMENTS (2d ed. 1902) § 808, cited in this case, to same effect.

³⁶ *Kline v. Shoup*, 38 Idaho 202, 226 P. 729 (1923).

³⁷ *Seal v. Banes*, 168 Okla. 550, 35 P. (2d) 704 (1934).

lands. It would mean that the court sells only the interests of designated heirs or devisees, not the entire interest of the decedent. Since a final order of distribution in many states would not be made until after the order of sale, it is entirely possible that the proceeding to sell might purport to seize the real estate of *A*, but a later order of distribution would determine that *B* and not *A* was the heir. Perhaps, all the Montana and Idaho decisions mean is this: a substantial compliance with statutory requirements for notice as to the sale is necessary in order for the court to have jurisdiction as a proceeding in rem. Otherwise the proceeding is merely in personam, and binds only persons actually served or those who appear. Indeed, as to the Oklahoma decision, it can be said that it merely holds that notice to heirs residing in the county is a condition precedent to the court's jurisdiction and that a failure to comply with that requirement renders the decree totally void.

A few other decisions concern the character of various other orders and decrees in the administration of a decedent's estate. Nearly all of them are to the effect that the decree or order is in rem. This has been held with respect to the partition among distributees,³⁸ a decree determining that the estate is insolvent,³⁹ an order permitting the personal representative to mortgage assets of the estate,⁴⁰ an order setting aside a homestead,⁴¹ and an order determining that all claims not properly filed are forever barred.⁴² On the other hand, a decree as to an advancement⁴³ and an order making an allow-

³⁸ *Wyman v. Campbell*, 6 Porter (Ala.) 219 (1838).

³⁹ *Hine v. Hussey, Admr.*, 45 Ala. 496 (1871).

⁴⁰ *Walker Bank & Trust Co. v. Steely*, 54 Idaho 591, 34 P. (2d) 56 (1934).

⁴¹ *Bedwell v. Dean*, 222 Ala. 276, 132 So. 20 (1930); *Kearney v. Kearney*, 72 Cal. 591, 15 P. 769 (1887); *Roundtree v. Montague*, 30 Cal. App. 170, 157 P. 623 (1916).

⁴² *Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1 (1907).

⁴³ *Cecil v. Cecil*, 19 Md. 72 (1862).

ance to an administrator for extraordinary services ⁴⁴ were declared not to have in rem operation.

No analysis has been found in the cases,—perhaps because no practical difficulties are presented,—of the character of a judgment or decree determining a contract claim against the estate. It is true, one decision ⁴⁵ appears to be to the effect that a decree of the probate court adjudicating a claim is in rem, and in view of the general trend of judicial decision it is to be expected that courts might so conclude. But suppose, as often happens, the claimant, in accordance with the terms of a statute, sues the executor or administrator in his representative capacity in a contract action in the court of general jurisdiction. Is this contract action in rem as to other persons interested in the estate? Obviously, it has in personam operation in so far as it determines liability on the contract. That is to say, if *A* has a contract claim against the decedent and the court determines that the administrator is liable in his representative capacity, it does not decide anything about the right of *B*, another claimant on that contract. It may, however, decide as to all the distributees and others interested in the estate, that the amount found due should be taken from the estate to pay the claimant, provided the estate is solvent. Of course, no real problem is likely to arise, since the claimant and the personal representative both submit themselves personally to the jurisdiction of the court; and, if the other persons interested in the estate are bound, the personal representative may be said to represent them. ⁴⁶

⁴⁴ *McMahon v. Ambach Co.*, 79 Ohio St. 103, 86 N. E. 512 (1908). It is believed that this was not a final order, and therefore, could be reconsidered in the accounting.

⁴⁵ *Ware v. Farmers' National Bank*, 37 N. M. 415, 24 P. (2d) 269 (1933).

⁴⁶ In general, as to the doctrine of representation, see RESTATEMENT, JUDGMENTS (1942) § 80, comments a and b. Of course, this doctrine is primarily applicable where the action is in personam or quasi in rem.

While most of the decisions are concerned with the question of *res judicata*, a few appear to derive other conclusions from the *in rem* character of probate proceedings. Thus it is held that, because the proceeding is *in rem*, a party who has appealed cannot dismiss the appeal;⁴⁷ that one not named as a party in the initial proceeding to probate a will can nevertheless intervene in the appeal because all persons having any interest are parties to an *in rem* proceeding;⁴⁸ and that an arbitration or compromise cannot be effectuated by particular parties, since there is no way of joining all persons in the stipulation for this purpose.⁴⁹

This survey of the decisions would seem to show that, for most purposes, the administration of the estate of a decedent consists of one or more proceedings *in rem*; that such proceedings are properly described in most jurisdictions as strictly *in rem* and not as quasi *in rem*; that unlike condemnation or admiralty proceedings which may consist in a single seizure and sale or other disposition of the *res*, the administration of a decedent's estate involves a considerable number of final orders, most of which concern the rights of the successors in interest of the decedent to his estate; and in so far as they do, they are *in rem*. There may, however, be orders which primarily concern the personal liability of particular persons, such as an order surcharging the executor or a judgment on a claim against the decedent; to the extent that they do not concern the *res*, they are not *in rem*.

⁴⁷ *Matter of Will of Storey*, 20 Ill. App. 183 (1886). See also *Hutson v. Sawyer*, 104 N. C. 1, 10 S. E. 85 (1889).

⁴⁸ *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902 (1913). See also *Sheeran v. Sheeran*, 96 Minn. 484, 105 N. W. 677 (1905). Compare *Griffin v. Milligan*, 177 Ala. 57, 58 So. 257 (1912).

⁴⁹ *Estate of Carpenter*, 127 Cal. 582, 60 P. 162 (1900); *In re Estate of Meredith*, 275 Mich. 278, 266 N. W. 351 (1936). Compare *Culpeper National Bank v. Morris*, 168 Va. 379, 191 S. E. 764 (1937).

II. WHAT NOTICE IS SUFFICIENT TO PREVENT COLLATERAL ATTACK?

We are now ready to consider the question: what notice is necessary to prevent collateral attack on a probate decree? It is clear that, regardless of the kind of proceeding in rem, the requirements of notice are necessarily somewhat less exacting than for a proceeding in personam. Many of the earlier cases on probate proceedings state or imply that no notice whatever is necessary because they are proceedings in rem. It is true, there is a well recognized doctrine to the effect that, in order to acquire jurisdiction, a court must have some power, actual or constructive, over the person or the thing which is the subject matter of the controversy.⁵⁰ The rule is stated in the *Restatement of Judgments* as follows:⁵¹ "A judgment is void unless the State in which it is rendered has jurisdiction to subject to its control the parties or the property or status sought to be affected." It is, of course, recognized that this proposition does not mean that the thing is the defendant. Here, as in the proceeding in personam, the parties are in fact persons. But in the proceeding in rem, the parties consist in an indefinite number of persons. Indeed, a judgment in rem may be said to affect all, or nearly all, persons in the world. Thus, in the probate proceeding, in determining who are the successors in interest of the decedent with respect to his estate the decrees determine not only that certain persons have an interest but that all other persons in the world do not. Since a proceeding in rem determines the rights of persons quite as much as a proceeding in personam, it follows that a mere control over the thing may not be enough, and that the judgments rendered thereunder will not be valid unless interested

⁵⁰ See the opinions of Holmes, J., in *McDonald v. Mabey*, 243 U. S. 90, 37 S. Ct. 343 (1917) and *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812 (1900).

⁵¹ RESTATEMENT, JUDGMENTS (1942) § 5.

parties have had reasonable notice and an opportunity to be heard. Otherwise the procedure would not meet constitutional requirements of due process. "A judgment is void," says the *Restatement of Judgments*, "unless a reasonable method of notification is employed and a reasonable opportunity to be heard afforded to persons affected."⁵² There is authority involving probate decrees to support this proposition.⁵³ But, as has been said, since all persons are bound by the decree, somewhat less notice is reasonable than in the case of proceedings in personam.

In determining what is reasonable notice in proceedings to administer a decedent's estate, however, it is believed that the courts have been and will continue to be profoundly affected by two things, namely: the peculiar function of administration proceedings and the recognized English historical procedures from which our procedures are derived. It must also be recognized that a state may impose by statute jurisdictional requirements of notice which go farther and are in addition to minimum requirements of due process.

Before considering these aspects of notice in probate proceedings, attention will first be directed to a principle which is particularly significant in its application to probate cases, namely that, if reasonable notice is given at the beginning of a proceeding, no further notice to interested parties is ordinarily required for any further steps in the same proceeding. The important question, then, is: Is the administration of a decedent's estate, from the filing of the petition for the appointment of the personal representative to the final order of distribution and the order discharging the personal representative, one judicial proceeding? This, of course, depends on the law of any particular state. But there is no doubt that in

⁵² *Id.* at § 6.

⁵³ *Goodrich v. Ferris*, 214 U. S. 71, 29 S. Ct. 580 (1909). As to proceedings in rem, in general, see *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 410 (1900).

a number of states it is a single proceeding, and that, if the law of a given state makes it a single proceeding, jurisdiction may be acquired by notice at the beginning of that proceeding. In *Michigan Trust Company v. Ferry*,⁵⁴ a testator died domiciled in Michigan and defendant Ferry petitioned for appointment as executor in that state and was duly appointed. Subsequently he removed to Utah and became of unsound mind. After he became a resident of Utah, steps were taken in the Michigan probate court to remove him. He was accordingly removed and the Michigan Trust Company was appointed administrator. The Michigan probate court also decreed that the defendant Ferry was indebted to the estate for a sum of over a million dollars. Action was brought by the administrator in the federal court of Utah against the defendant personally to recover this indebtedness, and the decision was for the defendant. The Supreme Court of the United States reversed that decision. To the objection that full faith and credit should not be given to the Michigan decree by the Utah court because there was no personal service on the defendant in the Michigan proceeding in which the indebtedness was decreed, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

“Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign’s pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. . . . This is true not only of ordinary actions but of proceedings like the present. It is within the power of a State to make the whole administration

⁵⁴ 228 U. S. 346, 33 S. Ct. 550 (1912).

of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives by the order of the Probate Court.”⁵⁵

The principle that the entire administration is one proceeding has been clearly recognized by several other courts.⁵⁶ Thus, in *Culver v. Hardenbergh*,⁵⁷ a sale of land by the probate court in connection with an administration proceeding was attacked on the ground that the court was without jurisdiction. The facts on which this objection was based were that two persons having been appointed administrators and one of them having subsequently resigned, the court appointed another person to act in his stead. This latter appointment was admittedly irregular, and the question was whether a sale of land made by that person in his official capacity was void. The court held that it was not void and that irregularities in the appointment did not affect the jurisdiction of the court since that jurisdiction attached on the initiation of the proceeding. After a full analysis of the proposition,⁵⁸ the court concluded with these words:

⁵⁵ At page 353.

⁵⁶ *Wm. Hill Co. v. Lawler*, 116 Cal. 359, 48 P. 323 (1897); *Heck v. Heck*, 34 Ohio St. 369 (1878); *Barrette v. Whitney*, 36 Utah 574, 106 P. 522 (1909); *Everett v. Wing*, 103 Vt. 488, 156 A. 393 (1931).

⁵⁷ 37 Minn. 225, 33 N. W. 792 (1887).

⁵⁸ See pages 234-236 of the court's opinion, which is in part as follows:

“By the proceedings for the probate of a will and its probate, or, in case there be no will, for the appointment, and the appointment, of an administrator, being the first step towards the administration and settlement of the estate, the constitutional jurisdiction of the court attaches to the estate. The jurisdiction given by the constitution is entire ‘over the estates,’ and where it has once attached it must continue (unless legally terminated) until its purpose is accomplished; that is, until the estate is administered and settled. Unless the administration of an estate is an entire proceeding, so that the jurisdiction of the court to direct and control it, once attaching, continues until its close, then it is or may be split up into an almost infinite number of subjects of jurisdiction, and the probate court, whenever it is necessary for it to take any action, must acquire jurisdiction to do the particular thing required of it, as though it were an original, independent

"We hold, therefore, that when a probate court legally probates a will, or appoints a first administrator, it thereby acquires jurisdiction to direct and control the administration of the estate; and that such jurisdiction (unless previously legally terminated) continues over the administration, as one proceeding, until its close; and that all the court may do in the course and for the purpose of the administration, including the removal or discharge of administrators, and the appointment of new administrators, is sustained by the jurisdiction thus acquired."

While the modern trend is to regard all steps in the administration of a decedent's estate as one proceeding, nevertheless, in some jurisdictions, certain steps are still regarded as separate. The steps required to sell land for the payment of debts originally constituted a separate proceeding. The land was not brought within the jurisdiction of the probate court, but the personal representative, by an independent suit against the heir or devisee, might secure an order for a sale of the land. Such a proceeding is still brought in some states in some court other than that in which probate of the will takes place.⁵⁹ Obviously that is an independent proceeding. Indeed, as we have seen, it may not even be strictly in rem. Even though statutes provide that sales of land to pay debts are in the probate court, the steps required to sell land may still be regarded as an independent proceeding.⁶⁰ This is likely to be true

proceeding. If the jurisdiction acquired by the proceedings for the probate of the will, or for the appointment of the first administrator, ceases with the probate or appointment, then the court cannot appoint commissioners or appraisers, nor extend the time for creditors to present claims, nor require an administrator to renew his bond, nor direct him to pay debts, or sell personal property, or take possession of real estate, or commence an action, or render his accounts, nor do any of the scores of things that may be necessary for a probate court to do in the course of directing the administration of an estate, without acquiring anew jurisdiction to do the particular thing.

"On the other hand, if the jurisdiction originally acquired continues beyond the probate or appointment, then there is no stopping place short of the close of the administration."

⁵⁹ See note 32, *supra*.

⁶⁰ *Lamont v. Vinger*, 61 Mont. 530, 202 P. 769 (1921).

where the statutory requirement of notice for sales of land is jurisdictional.⁶¹ On the other hand, if, as is the case in several states, the probate court assumes general control of the real estate of the decedent throughout the administration,⁶² a reasonable conclusion is that the sale of land to pay debts is but a part of a single proceeding to administer the decedent's estate.

In some states the personal liability of an executor who is in default is not determined as a part of the probate proceeding, but in a separate action brought by distributees and creditors rather than by the administrator *de bonis non*.⁶³ The determination of heirship may be either an independent proceeding or a part of the administration proceeding, depending upon the local statute.⁶⁴

Since the courts regard all or most of the steps in administration as a single proceeding, the most significant step from the standpoint of the requirement of notice is the initial one. What notice is necessary for the hearing on the petition for probate of a will or for the grant of administration? In this connection, it should be observed that the usual circumstances suggest a minimum of notice as reasonable. In a large number of cases it is important to have some one take charge of the property of a decedent as soon as he dies. This is obviously true in the case of an estate consisting of a farm or of a business involving perishable goods, or in any case where protection is needed to prevent damage, theft or embezzlement. Moreover, in the vast majority of cases there is no contest among the parties interested in the estate, and the administration is accomplished merely to make sure that the estate is distributed

⁶¹ See note 30, *supra*.

⁶² See Simes and Basye, "The Organization of the Probate Court in America," 43 MICH. L. REV. 113 at 121-130 (1944).

⁶³ See note 27, *supra*.

⁶⁴ Mich. Stat. Ann. (1943) §§ 27.3178(145) to 27.3178(149) inclusive. The proceeding may be either a part of the administration or may be brought as an independent proceeding.

in an orderly fashion. What is done is essentially administrative, and the judicial decrees rendered are all of a routine character and uncontested. Courts have also sometimes pointed out⁶⁵ that the death of the decedent is itself a fact which is likely to come to the attention of all near relatives, so that most interested parties may know that an administration is likely to be initiated. Of course, numerous instances could be pointed out where this is not the case; and the fact that the decedent is dead does not necessarily suggest to an heir the county in which his estate is being administered.

A further element tending to reduce the requirement of notice is the English procedural model furnished by the ecclesiastical courts. Probate could be either in common or in solemn form.⁶⁶ If in common form, no notice whatever was given. But at any time within thirty years interested parties might come in and demand probate in solemn form. The issue was then tried anew on notice to interested parties. If no one demanded probate in solemn form, the decree admitting the will to probate in common form was regarded as effectual. In the case of intestate estates,⁶⁷ it is probable that at least the surviving spouse could secure a grant of letters without notice; but notice to next of kin was ordinarily given when one of them applied for a grant.

Without doubt, if a given procedure was traditionally followed by English courts and copied in this country, that is a strong argument that the same procedure in this country is

⁶⁵ *Knight v. Hollings*, 73 N. H. 495 at 500, 63 A. 38 (1906) ("ordinarily the heirs learn of the decease of the person very soon after it occurs"); *Crippen v. Dexter*, 79 Mass. 330 at 333-334 (1859) ("A man dying, having property, usually dies with the knowledge of his kindred; the death itself is a fact of some notoriety in his neighborhood, and through the circle of his associates; proceedings for the settlement of his estate of necessity soon follow, and may be easily known to those most interested, so that actual knowledge of the proceedings will generally be had.")

⁶⁶ ATKINSON, *WILLS* (1937) 428.

⁶⁷ CONSET, *THE PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS* (3d ed. 1708) 14; 4 BURN, *ECCLESIASTICAL LAW* (9th ed. 1842) 366-367.

due process.⁶⁸ In this instance, of course, it may be said that the English practice only applied to the administration of personalty and that proceedings in England with respect to the lands of the decedent had to be initiated with notice. That argument, however, has not been accepted by the American courts. And the decisions on the point are unanimously to the effect that a probate in common form without any notice whatever is due process.⁶⁹ Moreover, in the United States at the present time probate in common form without any notice

⁶⁸ See *Coler v. Corn Exchange Bank*, 250 N. Y. 136, 164 N. E. 882 (1928), aff'd 280 U. S. 218, 50 S. Ct. 94 (1929), which sustained a summary proceeding to seize property of a person who deserted his wife and children. The decision was based in part upon the fact that the procedure had its roots in the distant past. Cardozo, Ch. J., giving the opinion of the court, quoted with approval from *Jackman v. Rosenbaum Co.*, 260 U. S. 22 at 31, 43 S. Ct. 9 (1923) as follows:

"The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."

⁶⁹ In *Sutton v. Hancock*, 118 Ga. 436, 45 S. E. 504 (1903), the court, in a full discussion of this question, so decided. A part of the opinion is as follows:

"Stated in a word, the contention is that the State has no power to make conclusive, after any lapse of time, a judgment which has the effect to deprive one of his property without any notice to him and without giving him an opportunity at the time of or before the rendition of the judgment to say why such judgment should not have been rendered. We do not think this proposition is universally true. The principle at the foundation of the constitutional provisions just referred to was brought across the waters with the common law. Any rule or procedure which is in accord with the settled usage and practice of the common law affords due process, within the meaning of that phrase as used in the various constitutions of this country. . . . It seems, therefore, to be well settled that at common law there was a conclusive presumption, after the lapse of time, in favor of the validity of a will proved in common form of law, and that this presumption had the effect of placing the will upon the same footing as if it had originally been proved in solemn form or per testes. Any system of laws which recognizes this common-law principle and provides for a reasonable time can not be said not to afford due process of law." (pp. 443-444).

Other cases to the same effect are: *Dickey v. Vann*, 81 Ala. 425, 8 So. 195 (1886); *Knight v. Hollings*, 73 N. H. 495, 63 A. 38 (1906); *Pratt v. Hawley*, 297 Ill. 244, 130 N. E. 793 (1921); *Farrell v. O'Brien*, 199 U. S. 89 at 117, 118, 25 S. Ct. 727 (1905). See also *Crippen v. Dexter*, 79 Mass. 330 (1859) and *People ex rel. Frazer v. Wayne Circuit Judge*, 39 Mich. 198 (1878).

To the effect that a grant of administration on intestacy without previous notice is invalid, see *Alabama Great Southern Railroad Co. v. Hill*, 139 Ga. 224, 76 S. E. 1001 (1912).

whatsoever is a part of a procedure in a score of states;⁷⁰ and in about the same number of states, it is possible to have a grant of administration without notice.⁷¹

But if the administration of a decedent's estate may be initiated without any notice whatever, what becomes of the requirement of notice and a fair hearing? How can the proposition just stated be squared with the following exposition of that doctrine in the *Restatement of Judgments*:⁷² "A judgment purporting to affect the interests of persons in a thing is void, even though the State has power over the thing, and the court has jurisdiction over it, if no notification was given"? Obviously the *Restatement of Judgments* does not ignore the judicial authority just cited and the practice in a score of states. The explanation would seem to be this. Notice and a fair hearing are offered to interested parties when there is probate in common form, but they are offered after the probate in common form, not before. In the states which permit probate in common form it is usual to find a requirement of notice immediately after the personal representative is appointed. This may take the form either of a notice to creditors or a notice of the appointment. Moreover, in practically all those

⁷⁰ Ark. Dig. Stat. (1937) § 14544; Del. Rev. Code (1935) § 3799; Fla. Stat. Ann. (1941) § 732.23; Ga. Code Ann. (1936) § 113-601; Ky. Rev. Stat. (1942) § 394.220; Md. Code (1939) art. 93, § 360; Miss. Code (1942) §§ 502 to 504; N. H. Rev. Laws (1942) c. 349, § 2; N. J. Rev. Stat. (1937) § 3:2-21; N. C. Gen. Stat. (1943) § 31-32; Ore. Comp. Laws (1940) § 19-204; S. C. Code (1942) § 8932; Va. Code (1942) § 5259; Wash. Rev. Stat. (1932) § 1380; W. Va. Code (1943) § 4070. In Indiana, Missouri, Pennsylvania and Tennessee probate may be had without notice although there is no statute so providing. See I HENRY, PROBATE LAW AND PRACTICE OF INDIANA (1931) 760; State ex rel. Mitchell v. Gideon, 215 Mo. App. 46, 237 S. W. 220 (1921); 2 HUNTER, PENNSYLVANIA ORPHANS' COURT COMMONPLACE BOOK (1939) 1122.

⁷¹ N. H. Rev. Laws (1942) c. 349, § 2. In three states notice is optional with the court: Ark. Dig. Stat. (1937) § 8; Mo. Rev. Stat. Ann. (1942) § 8; Ore. Comp. Laws (1940) § 19-211. In 13 states the statute is silent as to notice; in these states notice is apparently not required. These states are Alabama, Colorado, Delaware, Indiana, Iowa, Mississippi, New Mexico, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia, Wyoming.

⁷² RESTATEMENT, JUDGMENTS (1942) § 32, comment f.

states, an interested party, without being substantially prejudiced, has a reasonable time in which to have another hearing on the same issue after due notice. Thus, in substance, the practical result is not very different from that in the states where statutes provide that notice must precede a hearing on a petition for probate or grant of administration. For in those states it is commonly provided that a special administrator may be appointed summarily and without notice to take charge of the estate pending the hearing on the application for probate or administration. In states where proceedings may be initiated without notice, it would seem that interested parties are not seriously prejudiced. The personal representative can still be removed for cause, and a will can still be probated.

In jurisdictions where statutes provide for some sort of notice to initiate the administration, it is clear that publication is sufficient and that personal service on interested parties is not required.⁷³ While most of the cases so holding involve interested parties out of the jurisdiction, it would seem that publication would be sufficient even for parties within the state, if the legislature so provided.⁷⁴ Of course, if the legis-

⁷³ *Estate of Davis*, 136 Cal. 590, 69 P. 412 (1902); *Farmers' & Merchants' Nat. Bank v. Superior Court* (Cal. App. 1944) 148 P. (2d) 445, aff'd on rehearing, 150 P. (2d) 241; *Loring v. Steinman*, 1 Metc. (42 Mass.) 204 (1840) (decree of final distribution); *In re Estate of Eklund*, 174 Minn. 28, 218 N. W. 235 (1928) (decree of final distribution); *Starkey v. Kingsley*, 69 N. H. 293, 39 A. 1017 (1897) (decree of final distribution); *Matter of Horton*, 217 N. Y. 363, 111 N. E. 1066 (1916); *Roseman v. Fidelity & Deposit Co.*, 154 Misc. 320, 277 N. Y. S. 471 (1935); *Everett v. Wing*, 103 Vt. 488, 156 A. 393 (1931) (cert. den. 284 U. S. 690); *Krohn v. Hirsch*, 81 Wash. 222, 142 P. 647 (1914) (decree of final distribution); *Broderick's Will*, 21 Wall. (88 U. S.) 503 (1874); *Goodrich v. Ferris*, 214 U. S. 71, 29 S. Ct. 580 (1909) (decree of final distribution); *Christianson v. King County*, 239 U. S. 356, 36 S. Ct. 114 (1915) (decree of final distribution).

⁷⁴ *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708 (1840) (sale of land); *Hall's Heirs v. Hall*, 47 Ala. 290 (1872); *Sheldon v. Newton*, 3 Ohio St. 494 (1854) (sale of land); *Farley v. Davis*, 10 Wash. (2d) 62, 116 P. (2d) 263 (1941) (decree of final distribution); *Dower v. Seeds*, 28 W. Va. 113 at 134 (1886) (will contest).

lature imposes additional requirements of notice which are jurisdictional, then obviously they also must be complied with.

This leads us to the question: may the legislature impose requirements of notice as to a later step in the administration proceeding and make these requirements jurisdictional? Statutes not infrequently require some sort of notice at three points: at or immediately following the initiation of the administration proceeding; at the time creditors are required to file their claims; and at the closing of the estate when the final account is settled. If there are sales of real estate, notice of them is frequently required. In a few instances some of the notices subsequent to the initiation of the proceeding have been held to be jurisdictional.⁷⁵ But does that mean that there is more than one proceeding, or does it merely mean that a particular part of the proceeding will be invalid if no notice is given? It is possible that the latter may be the proper conclusion.

One more question should be briefly considered. Must there be an actual or constructive seizure of the res in order to give the court jurisdiction? It is true, following the type form of proceeding in rem which the courts seem so often to have in mind,—such as the admiralty proceeding or the proceeding to confiscate property,—the seizure of the res might in some instances be an appropriate method of giving notice to interested parties. But that is not the only way, nor is it, in some instances, the proper way, to give notice.⁷⁶ It is believed that, as to proceedings in rem in general, notice by

⁷⁵ In *re Killian*, 172 N. Y. 547, 65 N. E. 561, 63 L. R. A. 95 (1902) (settlement of accounts); *Schneider v. McFarland*, 2 Comstock (N. Y.) 459 (1849) (sale of land); *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370 (1913) (decree of distribution); *Ruth v. Oberbrunner*, 40 Wis. 238 (1876) (decree of distribution).

⁷⁶ See *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894); *Goodrich v. Ferris*, 214 U. S. 71, 29 S. Ct. 580 (1909); *Tyler v. Judges of the Court of Registration*, 175 Mass. 71 at 77, 78, 55 N. E. 812 (1900). But see *WAPLES, PROCEEDINGS IN REM* (1882), where the opposite view is stressed.

publication without seizure of the res can be a sufficient notice.⁷⁷ The jurisdictional requirement is not that the thing be seized but that it be within the state.⁷⁸ Certainly if a probate court did not acquire jurisdiction until the personal representative on behalf of the court took charge of the estate, numerous difficulties would be experienced, among which is the obvious one that the court must have jurisdiction to make the grant of letters testamentary or of administration before the personal representative takes charge of the estate.

III. WHAT PERSONS AND THINGS ARE BOUND BY A VALID PROBATE DECREE?

If it be determined that a probate decree is valid, the next inquiry is: What persons and what things are bound by it? Obviously, the principal purpose of the whole administration proceeding is to determine who are the successors in interest to the estate of the decedent and to preserve that estate until this is determined. Thus, unlike an eminent domain proceeding or a statutory proceeding to register title to land, the probate proceeding does not determine as to all the world who has title to the land and other things in which the decedent has an interest. It does not decide, as between the decedent and persons claiming adversely to him, who was the owner. But it does determine, as to all the world, who are the successors to whatever interests the decedent may have had.⁷⁹

⁷⁷ *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 410 (1900); *Calhoun National Bank v. Bentley*, 189 Ga. 355, 6 S. E. (2d) 288 (1940); and cases cited in note 76, *supra*.

⁷⁸ 2 PAGE, WILLS (3d ed. 1941) 38.

⁷⁹ That a proceeding *in rem* can deal only with particular interests has been recognized. See *Day v. Micou*, 18 Wall. (85 U. S.) 156 at 162 (1873). In that case the court said:

"A condemnation in a proceeding *in rem* does not necessarily exclude all claim to other interests than those which were seized. . . . Decrees of courts of probate or orphans' courts directing sales for the payment of a decedent's debts or for distribution are proceedings *in rem*. So are sales under attachments or proceedings to foreclose a mortgage, *quasi* proceedings *in rem*, at least. But in none of these cases is anything more sold than the estate of the decedent, or of the

What is the *res* with respect to which all persons are bound? It would appear to be the assets of the decedent within the state. That the estate is the subject matter of the proceeding is the usual view expressed by the courts.⁸⁰ A few, however, have said that, with respect to the decree admitting the will to probate, the will is the *res*.⁸¹ It has also been suggested that the *res* may be regarded as the status of testacy or intestacy.⁸² Several serious difficulties would be encountered as to either of these two views. If the will or the status of testacy or intestacy is the *res*, then, a determination of the

debtor or the mortgagor in the thing sold. The interests of others are not cut off or affected."

See *Kamerer v. Kamerer*, 281 Ill. 587, 117 N. E. 1027 (1917) indicating that probate decrees do not determine title as between the decedent and third parties.

⁸⁰ *Wyman v. Campbell*, 6 Porter (Ala.) 219 (1838); *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708 (1840); *Perkins' Exrs. v. Winter's Admrs.*, 7 Ala. 855 (1845); *Lyons v. Hamner*, 84 Ala. 197, 4 So. 26 (1887); *Wm. Hill Co. v. Lawler*, 116 Cal. 359, 48 P. 323 (1897); *In re Estate of Togneri*, 296 Ill. App. 33, 15 N. E. (2d) 908 (1938); *Loring v. Steinman*, 1 Metc. (42 Mass.) 204 (1840); *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99 (1895); *Fridley v. Farmers' & Mechanics' Bank*, 136 Minn. 333, 162 N. W. 454 (1917); *McPherson v. Cunliff*, 11 Serg. & R. (Pa.) 422 (1824); *Barrette v. Whitney*, 36 Utah 574, 106 P. 522 (1909). In *State ex rel. Gott v. Fidelity & Deposit Co.*, 317 Mo. 1078, 298 S. W. 83 (1927) the following statement appears at p. 1089: "Looking at the administration as an entirety, the *res* is the property of the deceased grasped through the personal representative as a court officer; but in the preliminary proceeding for his appointment, the *res* is the status of the officer." And in *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238 (1875) the court says, at p. 243: "Shall Mrs. Tisdale receive letters of administration, was the *res*."

⁸¹ *Torrey v. Bruner*, 60 Fla. 365, 53 So. 337 (1910); *State ex rel. Mitchell v. Gideon*, 215 Mo. App. 46, 237 S. W. 220 (1921); *Woodruff v. Taylor*, 20 Vt. 65 (1847). See, also, *Crippen v. Dexter*, 79 Mass. 330 (1859).

⁸² See *Hopkins*, "The Extraterritorial Effect of Probate Decrees," 53 YALE L. J. 221 at 226, 227 (1944). In the footnote on page 227, this writer says:

"The notion that jurisdiction in *rem* attaches to the status of testacy or intestacy finds a ready analogy in divorce cases where it is usual to speak of the marital status as the *res*. It seems to the writer unnecessary and confusing to extend the conception of jurisdiction in *rem* usually applied to physical property so as to include a relationship or status. The explanation for this unfortunate terminology would seem to be the historical distinction in our law between jurisdiction in *personam* and in *rem*, and the desire to sustain a claim to jurisdiction in these cases without the necessity of personal service of process. It would have been more realistic simply to say that the appropriate court has jurisdiction to determine the status without the necessity of personal service."

validity of the will in the state of domicile would be controlling as to land of the decedent in another state; and under constitutional provisions as to full faith and credit, the state where the land is situated would be compelled to recognize the decree admitting the will to probate. It is, of course, elementary that the reverse is the law.⁸³ Moreover, to regard a determination of the validity of a will as a judgment with respect to a status is completely to disregard the notion of status as it is used in connection with problems of the effect of foreign judgments.⁸⁴ If the determination of the validity of a will can be a matter of status, why not the determination of the validity of a deed, or even of a contract? And, incidentally, if the validity of a contract is a matter of status, what becomes of Sir Henry Maine's famous observation about civilization progressing from status to contract?⁸⁵ Indeed it is believed that the notion that the res is the will or that the res is a status has been advanced in the hope that it would make for a single administration of an estate, even though the decedent left assets in two or more states. That this is a laudable objective can not be denied, but the writer believes that it should be accomplished by legislation or, if necessary, by constitutional amendment, and that nothing will be gained by confusing the law of *res judicata* in this way.

While, as has been said, this paper does not purport to deal with the broad question of the effect of a foreign probate decree, the views of the Supreme Court of the United States on that problem furnish a guide for the determination of the question under consideration here. Nowhere has the theory of our highest tribunal been more clearly indicated than in

⁸³ GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) 436, 453.

⁸⁴ RESTATEMENT, *CONFLICTS* (1934) § 119: "In the Restatement of this subject, a 'status' means a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned."

⁸⁵ MAINE, *ANCIENT LAW* (10th ed. by Pollock 1930) 182.

the case of *Riley v. New York Trust Company*.⁸⁶ That case involved a bill for interpleader brought in Delaware by the Coca-Cola Corporation to determine the ownership of some of its stock, it being agreed that Delaware was the situs of the stock. The stock was the property of the estate of a Mrs. Hungerford. The Georgia court, in a probate proceeding to which the heirs and devisees were parties, had found that the decedent died testate domiciled in Georgia. Thereafter, administration proceedings were instituted in New York and an administrator was appointed. The New York administrator and certain New York creditors were not parties to the Georgia proceeding. The Delaware court found that the decedent was domiciled in New York and awarded the stock to the New York administrator. On certiorari to the Supreme Court of the United States, the judgment was affirmed. Mr. Justice Reed, speaking for the court, concluded that, while the Georgia decree operated in rem as to property in Georgia, it did not bind the New York administrator as to property outside the state of Georgia. He said:

" . . . So far as the assets in Georgia are concerned, the Georgia judgment of probate is *in rem*; so far as it affects personality beyond the state, it is *in personam* and can bind only parties thereto or their privies. . . . Phrased somewhat differently, if the effect of a probate decree in Georgia *in personam* was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process."⁸⁷

In the light of that decision, the following conclusions may be suggested. Strictly speaking a probate proceeding, being in rem, has validity as such only with respect to the estate of

⁸⁶ 315 U. S. 343, 62 S. Ct. 608 (1942). Earlier cases suggesting this doctrine are *Tilt v. Kelsey*, 207 U. S. 43, 28 S. Ct. 1 (1907); *Thormann v. Frame*, 176 U. S. 350, 20 S. Ct. 446 (1900); *Overby v. Gordon*, 117 U. S. 214, 20 S. Ct. 603 (1900); *Baker v. Baker, Eccles Co.*, 242 U. S. 394, 37 S. Ct. 152 (1917).

⁸⁷ At pages 353 and 354.

the decedent within the jurisdiction. But as to persons who were personally served or who appeared, its decrees may operate in personam, at least by way of collateral estoppel.⁸⁸ Of course, the foreign jurisdiction may, if it wishes, by statute or judicial decision determine that the devolution of title to the estate of the decedent in the foreign state is to follow the devolution of title to the estate of the decedent in the state of domicile.⁸⁹ But if property in the foreign state is bound, it is bound by the laws of the foreign state and not by the doctrine of *res judicata*.

Two situations occasionally arise which should be discussed with reference to the application of these propositions. Suppose the decedent has personal estate both in state *A*, the state of his domicile, and in state *B*. There are administration proceedings in both states and at the conclusion of the proceeding in state *B* personal property is transmitted by the ancillary administrator to the administrator in the state of domicile. Or suppose that there is no property of the decedent in the state of domicile, but the will is probated there and an

⁸⁸ See the discussion of this matter, *infra*. There is also authority tending to support the view that, if the domiciliary probate decree purports to dispose of personalty in the foreign state, persons who appear or are personally served are bound as to that property. In other words the decree operates directly in personam. See *Loewenthal v. Mandell*, 125 Fla. 685, 170 So. 169 (1936).

⁸⁹ While it is conceded that there are cases inconsistent with this view, it is believed that the appointment of a personal representative in state *A* does not *per se* give him title to property of the decedent in state *B*. See GOODRICH, *CONFLICT OF LAWS* (2d ed., 1938) § 182. It is true state *B* may have a statute or rule of law to the effect that the appointment of the personal representative in state *A*, which gives him title to personalty in state *A*, also gives him title to personalty in state *B*. And such a statute or rule would be valid except in so far as it might conflict with requirements as to due process. But the title of the personal representative is derived from the law of state *B*, and not from the judicial power of the court of state *A*. Of course, state *A* may, and probably does, authorize the personal representative to bring into state *A* any property of the decedent in state *B*; and in so far as unadministered property is brought within state *A*, the decrees of its probate court can operate in rem as to persons claiming interests in it. But, if the courts of state *B* had, in a probate proceeding, determined the devolution of the property while it was still in that state, the probate court of state *A* could not disregard that, even though the property was later brought into state *A*.

executor is appointed. Subsequently the executor brings unadministered personal property of the decedent from some other state into the state of domicile. In each case, do decrees of the probate court of the state of domicile operate in rem as to property brought within the state after the decree is rendered? It is believed that they can do so. Our question is essentially one of due process. As to the case where there were no assets in the state of domicile (which would seem to be the more difficult) interested parties would be just as likely to find out about the probate proceeding if the decedent were domiciled in the state as in a case where he had assets but not a domicile in the state. Indeed, in trying to find out where probate proceedings might be instituted, interested parties would normally investigate the state of domicile whether the decedent left estate there or not. Thus, it would appear that the res is not only the estate of the decedent in the state of probate at the time of the decedent's death, but may also include property subsequently brought into that state.⁹⁰

In considering the operation of probate decrees up to this point we have assumed that the only limitations to their operation within the state are limitations as to jurisdiction and due process. It must be pointed out, however, that there are two other limitations. First, the decree itself may, by its terms, limit its operation to particular property or exclude its operation as to particular persons. In jurisdictions where the decree of distribution does not deal with real estate, the res, in so far as that decree is concerned, is personal estate within the state. But in those same states the decree admitting the will to probate is binding as to real as well as personal property. Thus the res with respect to that decree would be the real and personal property of the decedent within the state. Moreover, if assets of the decedent are not discovered at the time of the decree of distribution and are not covered by its

⁹⁰ See note 89, *supra*.

terms, then the decree would not operate as to them, even though they are within the state.

Second, certain persons may be excluded from the operation of a probate decree by reason of local statutes. It is not uncommon to find a statutory provision to the effect that heirs or devisees shall receive personal notice or notice by registered mail.⁹¹ Three possible consequences may arise from a failure

⁹¹ Kan. Gen. Stat. (Supp. 1943) § 59-2209: ". . . The petitioner shall mail or cause to be mailed a copy of the notice to each heir, devisee, and legatee or guardian and ward, as the case may be, other than the petitioner, whose name and address are known to him."

It is not uncommon to provide for the conclusive effect of probate decrees. Cal. Code Civ. Proc. (Deering, 1941) § 1908: "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: 1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, . . . the judgment or order is conclusive upon the title to the thing, the will or administration. . . ." Fla. Stat. Ann. (1941) § 732.26: ". . . The probate of a will in Florida unless revoked or revised upon appeal shall be conclusive in any collateral suit or controversy relating to the property, real or personal, thereby devised or bequeathed, of the due execution of the will by a competent testator of his own free will and that such will, at the date of the testator's death, was unrevoked." Wash. Rev. Stat. (1932) § 1385: ". . . If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding and final as to all the world. . . ."

On the other hand, a statute may be found which, if taken literally, might indicate that decrees have only in personam effect. N. Y. Surr. Ct. Act, § 41, reads as follows: "The surrogate's court, in any action or proceeding before it, shall have jurisdiction of the following:

"1. The petitioner.

"2. Parties who have been duly cited, including all those described as being persons belonging to a class, or connected with the decedent, or as interested in the property or matter in question, whether designated by their full and correct names or not.

"3. Persons of full age who have not been judicially declared to be incompetent to manage their affairs, and public officers, commissions or bodies.

"a. Who shall, either before or after the filing of the petition, waive the issue or service, or both, of the citation by an instrument in writing signed, acknowledged or proved and duly certified.

"b. Who, whether named in the petition or citation or not, shall appear personally in court and file written signed notice of appearance acknowledged, or proved, and duly certified.

"c. Who, whether named in the petition or citation or not, shall appear by attorney whose authority in writing to appear, so signed, acknowledged or proved, and duly certified, shall be filed.

"d. Who shall appear by attorney appointed pursuant to sections two hundred and thirty-five or two hundred forty-nine-x of the tax law. The notice of ap-

to comply with such a requirement: (1) the court may conclude that the requirement is not jurisdictional, and that a failure to comply with it is merely error and does not make the decree invalid as to anyone; (2) the court may determine that the decree is void as to heirs and devisees who were not served, but valid as to all other persons; or (3) the court may decide that the decree is totally void. Apparently each of these conclusions has been reached as to particular statutes.⁹² If the court concludes that the decree is void only as to the heirs or devisees within the jurisdiction who are not personally served, does that indicate that the decree is in personam or quasi in rem, since it does not bind all the world? Formalistic definitions of a proceeding in rem might lead one to that conclusion. But it is believed that there is no good reason why a decree binding on all the world except a few designated persons should not be regarded as a decree in rem.

So far we have considered the extent to which probate decrees are *res judicata* as to the very thing which they determine about the *res*. But judgments and decrees also are ordinarily effectual as a collateral estoppel in totally different causes of action with respect to questions of fact actually litigated and determined.⁹³ There is, however, an important

pearance shall be signed by such attorney and shall show the fact of his appointment as aforesaid.

"4. All parties to any action at law which pursuant to the provisions of the surrogate's court act or the civil practice act may be transferred to it."

Section 80 provides that "Every decree of a surrogate's court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained. . . ." But see New York cases cited in note 10, *supra*, to the effect that decrees regarding the probate of wills operate in rem.

⁹²To the effect that the proceedings are not void for lack of notice: *Hall's Heirs v. Hall*, 47 Ala. 290 (1872) (probate of will); to the effect that they are void as to persons not served: *Kline v. Shoup*, 38 Idaho 202, 226 P. 729 (1923) (sale of land); to the effect that they are totally void: *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370 (1913) (grant of administration); *Voyles v. Hinds*, 186 Ind. 38, 114 N. E. 865 (1917) (contest of will).

⁹³As to this doctrine, when applied to proceedings in personam, see Scott, "Collateral Estoppel by Judgment," 56 HARV. L. REV. 1 (1942). For decisions involving the application of the collateral estoppel doctrine to probate decrees,

limitation on this doctrine when applied to a proceeding *in rem*. As stated in the *Restatement of Judgments*,⁹⁴ "A judgment in such a proceeding will not bind anyone personally unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact."

Two Massachusetts cases illustrate the application of this doctrine of collateral estoppel. In *Brigham v. Fayerweather*⁹⁵ a legatee under a will sued in equity to have declared void a mortgage executed by the testator on the ground of insufficient mental capacity. The will was executed after the mortgage, and the defendant contended that the order admitting the will to probate should have been admitted in evidence to show the testator's sanity when he executed the mortgage. Finding there was no error, the Supreme Judicial Court said:

"We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes. . . .

"If the defendant as well as the plaintiff had been a party to the probate of the will, a different question would arise."⁹⁶

In *Sly v. Hunt*,⁹⁷ just such a situation arose. In an action on a contract for services rendered to a testator, the testator's

see *State ex rel. Gott v. Fidelity and Deposit Co.*, 317 Mo. 1078, 298 S. W. 83 (1927); *Munday v. Knox*, 323 Mo. 411, 18 S. W. (2d) 487 (1929). See also *Overby v. Gordon*, 177 U. S. 214 at 227, 20 S. Ct. 603 (1900).

⁹⁴ RESTATEMENT, JUDGMENTS (1942) § 73 (2). See also Comment c to that section.

⁹⁵ 140 Mass. 411, 5 N. E. 265 (1886).

⁹⁶ *Id.* at 413-415.

⁹⁷ 159 Mass. 151, 34 N. E. 187 (1893).

sanity was put in issue. Plaintiff and defendant both participated in the proceeding in which the will was admitted to probate. It was held, distinguishing *Brigham v. Fayerweather*, that the parties were estopped to assert that the testator was of unsound mind when he executed the will.

Without going into detail, it may be suggested that perhaps a consideration of the doctrines of collateral estoppel might throw some light on the question of the effect of a foreign probate decree. Suppose *A* dies testate domiciled in state *X*, leaving real and personal property in state *X* and real and personal property in state *Y*. Since the probate decrees in state *X* can only operate directly on the property in that state, they have force as judgments in rem only as to that property. To the extent that they purport to deal with property in state *Y*, the court is, strictly speaking, without jurisdiction. But the laws of state *Y* are to the effect that the law of state *X* is to be applied in determining the devolution of personal property in state *Y*. Moreover, any persons who are actually parties to the proceeding in state *X* are bound as to any facts determined in that proceeding. Among these are the facts determining that testator died domiciled in state *X*. Thus, the effect of the opinion in *Riley v. New York Trust Company*,⁹⁸ already discussed, is that, as between persons actually appearing or personally served in a probate proceeding in which domicile is determined, there is a collateral estoppel which operates even in another state. As to the real estate in state *Y*, however, the law of that state does not distribute it in accordance with the law of the domicile. Therefore, the finding of domicile is irrelevant as to the questions involved in the distribution of testator's real estate in state *Y*.

By way of summary, the following conclusions are suggested. The proceeding to administer the estate of a decedent is properly described as strictly in rem. Nevertheless, due to the peculiar function of administration, to the history of its

⁹⁸ 315 U. S. 343, 62 S. Ct. 608 (1942).

procedures, and to the fact that administration is ordinarily accomplished by a series of final decrees and not by a single decree, many aspects of this proceeding are unique and do not precisely fit into the type form of proceeding in rem such as the condemnation or the admiralty proceeding. This series of steps in the administration of a decedent's estate may be, and commonly is, for the purpose of determining the requirements of notice and a fair hearing, a single proceeding. While probate decrees are strictly in rem to the extent that they involve a determination of the persons who succeed to the property interests of the decedent within the state, some of them may have in personam operation. But as to those which are in rem, the res is the estate of the decedent within the state. This does not mean that the proceeding determines all the owners of the property in which the decedent had an interest. Rather it decides who are the successors to the decedent with respect to any interests in property which he may have had at the time of his death. While probate decrees in rem do not directly operate as to property without the state, they can affect it by the operation of the laws of the foreign state; and doctrines of collateral estoppel may operate to bind interested parties as to property in the foreign state. Finally, it is believed that the legal doctrines herein discussed amount to nothing more than a unique application of recognized principles of *res judicata*.

"Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past," said Mr. Justice Bradley. "The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem."⁹⁹

⁹⁹ Case of Broderick's Will, 21 Wall. (88 U. S.) 503 at 519 (1874).

The Venue of Probate and Administration Proceedings*

Paul E. Basye

WITH the division of each state into counties or districts and the creation in each such subdivision of some court for the probate of wills and the administration of estates, it became necessary to designate which of such courts should undertake these functions in a particular estate. It is not the purpose of this study to consider problems arising out of conflicts of jurisdiction as between states insofar as independent determinations of domicile of a decedent may be made. That a decedent died a resident of the state undertaking an administration upon his estate will be assumed; or, if he died a nonresident, that there are assets within the state justifying administration. This study is concerned solely with the designation and determination of the county within the state where such probate and administration should be entertained and carried out.

Historically, venue in civil actions meant the county in England to which process was issued to the sheriff to bring a jury from that county to Westminster, and later to the county in which the trial was to be had. This fitted in well with the procedural plan then prevailing for summoning the jurors, who were presumably acquainted with the facts, from the very community where the cause of action arose. But when jurors ceased to make findings on their own knowledge, a jury could be drawn from the community of trial, and at the same time it became possible—indeed necessary—to determine venue in advance of trial. It is not possible here to trace the elements which have found their way into statutes for determining venue in civil actions. Suffice it to say that these statutes bear various

* Originally printed as an article in 43 Mich. L. Rev. 471 (1944).

marks of the place where the cause of action arose, where one or more of the parties to the action resided, or where the defendant might be found.¹

In the English ecclesiastical courts venue for determining the place of administration upon the estate of a decedent developed in a wholly different setting. The ordinary ecclesiastical courts had jurisdiction to probate wills and grant letters upon the estate of a decedent who died, or who was domiciled, within the diocese.² Where, however, the decedent was possessed of *bona notabilia* (effects of a certain value, usually in excess of £5, but an amount varying in different places and often dependent upon fine distinctions as to the nature of the property)³ in another diocese, probate and administration were granted by the Prerogative Court of Canterbury or York.⁴ And where personal property existed in both provinces two probates and grants of letters were necessary.⁵ Also, if it appeared, after letters were duly granted by an ordinary ecclesiastical court, that the decedent was possessed of *bona notabilia* within another jurisdiction, the probate and administration were held to be void.⁶ Because of the ill-defined nature and varying amounts of *bona notabilia*, the difficulties, inconveniences and mistakes incident to the retention of such doctrine in the law and the consequences of void probates and administrations, the royal commissioners, in 1832, recommended the abolition of all ecclesiastical probate jurisdiction.⁷ This recommendation was translated into

¹ For a discussion of this development, see 1 CHITTY, PLEADING (1809) 267 et seq.; STEPHEN, PLEADING (Tyler ed. 1924) 268 et seq.; 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (2d ed. 1924) 117-119, 140-142; Foster, "Place of Trial in Civil Actions," 43 HARV. L. REV. 1217 (1930).

² BURN, ECCLESIASTICAL LAW (9th ed. by Phillimore 1842) 292-293.

³ Id. at 294-296.

⁴ Id. at 293.

⁵ Id. at 296. See also REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832) 23.

⁶ REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832) 23.

⁷ Ibid.

an accomplished fact in 1857 at which time courts of probate were established fully coordinate with the common-law courts at Westminster.⁸

The doctrine of *bona notabilia* never found its way into this country.⁹ It is true that vestiges of the practice of requiring separate administrations on decedents' estates where property was found in more than one county may be noted in some early American statutes.¹⁰ At the present time, however, the jurisdiction of a probate court extends to all property of a decedent in any county in the state. But what county do the statutes designate for the probate of wills and the administration of estates, and what county should they designate in the interest of convenience and efficiency?

Such designation should primarily serve the ends of convenience, and aid in the prompt and efficient administration of estates. In laying down general rules designed to serve those ends it may be expected that a certain degree of arbitrariness will appear, but it should be kept at a minimum. Fixed rules seem largely to prevail in many old statutes still operating at the present time. Although some of these statutes served well enough in former times when one's domicile, that of his nearest of kin, and most of his property were all likely to be confined to a single county, they are not always the most satisfactory under modern conditions. The sole justification for fixed rules in determining venue lies in the necessity for having something predetermined to go by, and in resolving conflicts when they do occur. A definite trend away from an absolute fixation of venue is clearly evident in the more recent probate statutes and codes,¹¹ particularly in the case

⁸ 20-21 Vict., c. 77, p. 423 (1857).

⁹ In the Matter of Coursen's Will, 4 N. J. Eq. 408 at 414 (1843).

¹⁰ See, for example, Act of 1733, c. 5 in 2 Acts and Resolves of the Province of Massachusetts Bay, 1715-1741, p. 689 (1774).

¹¹ Del. Rev. Code (1935) §§ 3799 and 3807; Fla. Stat. Ann. (1941) § 732.06; Ga. Code Ann. (1936) §§ 113-702 and 113-1211; Iowa Code (1939) § 10763;

of nonresidents. As will be observed from the text of the proposed Model Probate Code¹² a maximum latitude of choice is given to those who will ordinarily take the initiative in such matters, on the assumption that convenience will govern that choice within the permitted limits.

It should be emphasized at the outset that the statutes under consideration are statutes of venue and not statutes upon which the jurisdiction of courts is predicated. Jurisdiction means *power* to hear and adjudicate.¹³ Venue refers only to the choice or designation of a particular county in which the probate proceedings should be instituted and carried through to

Kan. Gen. Stat. (Supp. 1943) § 59-2203; Me. Rev. Stat. (1930) c. 75, § 9; Mass. Ann. Laws (1932) c. 215, § 3; Mich. Stat. Ann. (1943) §§ 27.3178(19), (98) and (120); Minn. Stat. (1941) § 525.82; Neb. Comp. Stat. (1929) § 30-313; Nev. Comp. Laws (Supp. 1941) § 9882.01; N. H. Rev. Laws (1942) c. 346, § 8; N. C. Gen. Stat. (1943) § 28-1; N. D. Comp. Laws (1913) § 8526; Ohio Gen. Code (Page, 1937) § 10511-4; R. I. Gen. Laws (1938) c. 569, § 3; Tenn. Code (Michie, 1938) § 8145; Vt. Pub. Laws (1933) § 2725; Wash. Rev. Stat. (1932) § 1376; Wis. Stat. (1943) § 311.01.

¹² Section 61 of the Model Probate Code dealing with venue for the purposes of probate of wills and for all subsequent proceedings in connection with the administration of estates is as follows:

"Venue.

"(a) Proper county. The venue for the probate of a will and for administration shall be:

"(1) In the county in this state where the decedent had his domicile at the time of his death.

"(2) If the decedent had no domicile in this state, then in any county wherein he left any property or into which any property belonging to his estate may have come.

"(b) Proceedings in more than one county. If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced shall extend to all of the property of the estate in this state.

"(c) Transfer of proceeding. If it appears to the court at any time before the decree of final distribution in any proceeding that the proceeding was commenced in the wrong county or that it would be for the best interests of the estate, the court, in its discretion, may order the proceeding with all papers, files and a certified copy of all orders therein transferred to another [] court, which other court shall thereupon proceed to complete the administration proceeding as if originally commenced therein."

¹³ 1 BEALE, CONFLICT OF LAWS (1935) 274.

completion.¹⁴ Power or jurisdiction to entertain and supervise the administration of estates is conferred generally upon probate courts; venue is the means of dividing or *allocating the work* among all of the probate courts in the state.¹⁵ It has even been suggested that there is but one probate court in each state with a branch in each county.¹⁶

I. FACTORS WHICH DETERMINE VENUE

A. A VENUE STATUTE, NOT A JURISDICTION STATUTE

Under the early statutes designating the particular court in which wills should be probated and administration granted it was usually provided that the court in the county wherein the deceased resided at the time of his death should have "jurisdiction" to grant probate and letters of administration. Death and residence within the county were essential "jurisdictional" facts to be alleged and found by the court. But if either of these was not true in fact, it was said that all proceedings were utterly void and could be attacked at any time, directly or indirectly. Notice to interested parties given by a court without jurisdiction was regarded as no notice at all. "The persons interested cannot be required to watch the proceedings of all the Probate Courts of the State, at all times," said the Cali-

¹⁴ 1 BEALE, CONFLICT OF LAWS (1935) 115.

¹⁵ In the words of Mr. Justice Rugg, "The distinction between jurisdiction and venue is plainly established. . . . Jurisdiction is a term of comprehensive import. It concerns and defines the power of judicatories and court. It embraces every kind of judicial action touching the subject of the action, suit, petition, complaint, indictment or other proceeding. It includes power to inquire into facts, to apply the law, to make decision and to declare judgment. . . . Venue in its modern and municipal sense relates to and defines the particular county or territorial area within the State or district in which the cause or prosecution must be brought or tried. It commonly has to do with geographical subdivisions, relates to practice or procedure, may be waived, and does not refer to jurisdiction at all. . . ." *Paige v. Sinclair*, 237 Mass. 482 at 483-484, 130 N. E. 177 (1921).

See also *Southern Sand and Gravel Co., Inc. v. Massaponax Sand and Gravel Corp.*, 145 Va. 317, 133 S. E. 812 (1926); *In re Summerfield's Estate*, 158 Kan. 380, 147 P. (2d) 759 (1944).

¹⁶ *In re Estate of Davidson*, 168 Minn. 147 at 151, 210 N. W. 40 (1926).

fornia court in an early case.¹⁷ "The proceedings are summary and special, and must be in strict conformity with the law." Such was the common attitude toward probate courts, at that time regarded as inferior tribunals whose proceedings must conform in fact to every requirement of the statute.

In the course of time a very substantial body of authority accumulated which construed such statutes as limiting the jurisdiction of probate courts to the administration of estates of decedents who had actually died domiciled within their geographical limits; yet despite the court's own determination of this so-called "jurisdictional" fact, such determination remained open to attack in subsequent and collateral proceedings. The result was chaotic. Several administrations could be instituted and carried on in different counties at the same time, and debtors subjected to multitudinous actions by different executors or administrators of the same estate. Confusion and uncertainty were in the ascendant. No one could depend upon the title to property obtained through a probate sale. The net effect on titles to real estate was well nigh disastrous.

Gradually, however, the position of probate courts has risen in the law's esteem. Made courts of record in most states, accorded presumptions by statute as to the validity and regularity of their proceedings, and made coordinate with courts of general jurisdiction in a few states, they began to lose their inferiority.¹⁸ The utterly indefensible holdings that the jurisdiction of probate courts could be attacked collaterally at any time and all dependent proceedings held for nought were destined to fall. Faith in judicial proceedings was felt to be just as important in probate matters as elsewhere. A court may erroneously assume to act in a given

¹⁷ *Beckett v. Selover*, 7 Cal. 215 at 237 (1857).

¹⁸ See Simes and Basye, "The Organization of the Probate Court in America," 42 MICH. L. REV. 965 at 982 et seq. (1944).

case. Today its action may be erroneous but ordinarily it is not void.

Nevertheless there remains a small body of authority which continues to construe venue statutes as limiting the jurisdiction of probate courts and making their determinations of jurisdiction inconclusive. Two administration proceedings may be carried on simultaneously, and third parties subjected to two actions for the same thing, without any assurance as to which will be upheld. Fortunately, however, this possibility is confined to two states at the most and is not likely to survive much longer the tests of time and necessity.

B. ESTATES OF RESIDENT DECEDENTS

In formulating a statute specifying the county where the will of a resident decedent should be probated and his estate administered upon, convenience of the persons interested should control.¹⁹ Two elements exist here: convenience as to assets of the estate; and convenience as to parties. Both of these may and usually do suggest the same place. Assets may consist of land, tangible personalty, intangible personalty, and causes of action to be instituted or prosecuted. At times there may be actions to be defended. The various parties involved include heirs and distributees, witnesses who may be called upon to prove the will or to testify in proceedings, and persons to be consulted by the executor or administrator in connection with the administration of the estate.

For resident decedents, the designation in every statute of the venue for probate and administration is the county of

¹⁹ "The policy of the statute in fixing venue is the convenience of the parties. It is a mere privilege of the defendant which he may waive, if he wishes, and which he will be deemed to have waived, unless he raised the objection in the manner prescribed by statute. On the other hand, the policy of the statute in fixing jurisdiction is to determine the character or nature of the cause of which the several courts of the state may take cognizance, which cannot be enlarged or defeated by any act of the parties. Neither consent nor waiver can confer juris-

residence or domicile.²⁰ In the vast majority of cases this will be the most convenient place in terms of the elements mentioned. On the basis of convenience and of the universal acceptance of this single formula in the case of resident decedents, its retention seems a desirable one.

The phraseology of all present statutes is to the effect that administration is to be had in the county in which the decedent was a resident or an inhabitant or where he was domiciled. A very few designate venue as the county where he had his mansion house.²¹ All of these phrases are interpreted as equivalent to domicile.²² A few recent statutes employ the term "domicile"²³ because it has a more definite and fixed legal meaning. This would seem to be the preferable term for determining venue.

diction, though it may admit venue." Concurring opinion in *Southern Sand and Gravel Co., Inc. v. Massaponax Sand and Gravel Corp.*, 145 Va. 317 at 332, 133 S. E. 812 (1926).

²⁰ Only one significant deviation from this universal formula has been noted. In Alabama a testator may designate the county where administration is to be had on his estate provided he owns property in such county at the time of his death. Ala. Code (1940) t. 61, § 35. Another section provides that when a resident decedent dies intestate and leaves no assets subject to administration in the county of his residence, and no administration is granted in such county within three months after his death, then administration may be granted in any county where he leaves assets. Ala. Code (1940) t. 61, § 80. Both of these sections are designed to serve the interests of convenience.

In all the citations which follow, reference is made to provisions dealing with the probate of wills as well as administration upon estates. A few statutes are explicit to the effect that if probate is had in a given court, administration must also be had there, and vice versa. Others are silent on the subject. While either may be had without the other, clearly they should be in the same court even though not applied for at the same time.

²¹ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 206; Md. Code (1939) art. 93, § 15; Mo. Rev. Stat. Ann. (1942) § 4; N. M. Stat. (1941) § 33-103; Va. Code (1942) § 5247; W. Va. Code (1943) § 4064.

²² See ATKINSON, WILLS (1937) 560. Only one dissent from this has been found—an early dictum to the effect that "inhabitant" is a narrower term than "domicile"—which would have little weight today in view of the universal acceptance to the contrary. *Holmes v. Ore. & Cal. Ry.* (D. C. Ore. 1881) 6 Sawy. 276, 5 F. 523.

²³ The term "domicile" is used in the statutes of Florida, North Carolina, Ohio and Texas. Fla. Stat. Ann. (1941) § 732.06; N. C. Gen. Stat. (1943) § 28-1; Ohio Gen. Code (Page, 1937) § 10504-15 (probate of will only); Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3293.

C. ESTATES OF NONRESIDENT DECEDENTS

In the case of nonresident decedents the factors determining venue are quite different in most cases. The domicile of the decedent and presumably of his family has been elsewhere. The convenience of the heirs and distributees must be in terms of access to the assets of the estate and to the place of administration. Convenience for the executor or administrator may correspond or differ. Localization of assets is no longer even a theoretical possibility.²⁴ Both tangible and intangible assets may be located in several counties. Consequently it is not surprising to find each state groping for its own formula, each predicated upon some assumed relation between the localization of assets and the place of administration.

In nearly all of the existing statutes designating venue in cases of nonresidents, elaborate provisions are found specifying one or more of the following places as the venue for administration: the county (1) where the decedent's land or the greater part (or any part) thereof lies;²⁵ (2) where his personal estate or the greater part (or any part) thereof is located;²⁶ (3) where his estate or the greater part (or any part) thereof is located;²⁷ (4) where the decedent died;²⁸

²⁴ *Curry v. McCanless*, 307 U. S. 357, 59 S. Ct. 900 (1939).

²⁵ Ark. Dig. Stat. (1937) §§ 5 and 14529; Ga. Code Ann. (1936) § 113-702 (where land devised); Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 206; Ky. Rev. Stat. (1942) §§ 394.140 and 395.030; La. Civ. Code (Dart, 1932) art. 935 (immovable property); Miss. Code (1942) § 495 (where land devised); Mo. Rev. Stat. Ann. (1942) §§ 4 and 531; N. J. Rev. Stat. (1937) § 3:2-41 (where land devised); N. M. Stat. (1941) § 33-103; N. Y. Surr. Ct. Act, § 45; Ore. Comp. Laws (1940) §§ 19-206 and 19-210 (only if jurisdiction has not been assumed under other subdivisions of § 19-210); Va. Code (1942) §§ 5247 and 5360; W. Va. Code (1943) §§ 4064 and 4123 (where land devised); Wis. Stat. (1943) § 310.08 (as to probate of wills).

²⁶ Colo. Stat. (1935) c. 176, § 71; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 206; La. Civ. Code (Dart, 1932) art. 935; Md. Code (1939) art. 93, §§ 15, 45, and 356; Miss. Code (1942) §§ 495 and 525; N. M. Stat. (1941) § 33-103; N. Y. Surr. Ct. Act, § 45.

²⁷ Ark. Dig. Stat. (1937) §§ 5 and 14529; Conn. Gen. Stat. (1930) §§ 4888 and 4904; Del. Rev. Code (1935) §§ 3799 and 3807; Fla. Stat. Ann. (1941) § 732.06; Ga. Code Ann. (1936) § 113-1211; Ind. Stat. (Burns, 1933)

(5) where he died and left assets;²⁹ (6) where he leaves assets, having died out of the state;³⁰ (7) where he leaves estate, having left no estate within the county where he died;³¹ (8) where assets come after his death;³² (9) where there may be

§§ 6-201, 6-302 and 7-403; Kan. Gen. Stat. (Supp. 1943) § 59-2203; Ky. Rev. Stat. (1942) §§ 394.140 and 395.030; Me. Rev. Stat. (1930) c. 75, § 9; Mass. Ann. Laws (1932) c. 215, § 3; Mich. Stat. Ann. (1943) §§ 27.3178(19), (98) and (120); Minn. Stat. (1941) § 525.82; Mo. Rev. Stat. Ann. (1942) § 4; Mont. Rev. Code (1935) § 10018; Neb. Comp. Stat. (1929) §§ 30-215 and 30-313; Nev. Comp. Laws (Supp. 1941) § 9882.01; N. H. Rev. Laws (1942) c. 346, §§ 8 and 9; N. M. Stat. (1941) § 33-103; N. C. Gen. Stat. (1943) § 28-1; N. D. Comp. Laws (1913) § 8526; Ohio Gen. Code (Page, 1937) §§ 10504-15, 10511-4; Pa. Stat. Ann. (Purdon, 1930) t. 20, §§ 341 and 1862; R. I. Gen. Laws (1938) c. 569, § 3; S. C. Code (1942) §§ 120, 211, 8930 and 8968; Tenn. Code (Michie, 1938) § 8145; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3293; Utah Code (1943) § 102-1-2; Vt. Pub. Laws (1933) § 2735; Va. Code (1942) §§ 5247, 5360; Wash. Rev. Stat. (1932) § 1376; W. Va. Code (1943) §§ 4064 and 4123; Wis. Stat. (1943) §§ 253.03 and 311.01; Wyo. Rev. Stat. (1931) § 88-207.

²⁹ Ark. Dig. Stat. (1937) §§ 5 and 14529; Ky. Rev. Stat. (1942) §§ 394.140 and 395.030; La. Civ. Code (Dart, 1932) art. 935; Md. Code (1939) art. 93, §§ 15 and 356; Miss. Code (1942) §§ 495 and 525; Mo. Rev. Stat. Ann. (1942) §§ 4 and 531; N. M. Stat. (1941) § 33-103; N. Y. Surr. Ct. Act, § 45; N. C. Gen. Stat. (1943) § 28-1; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3293; Va. Code (1942) §§ 5247 and 5360; Wash. Rev. Stat. (1932) § 1376; W. Va. Code (1937) §§ 4064 and 4123.

³⁰ Ala. Code (1940) t. 61, §§ 35 and 80; Ariz. Code (1939) § 38-101; Cal. Prob. Code (Deering, 1941) § 301; Idaho Code (1932) § 15-101; Mont. Rev. Code (1935) § 10018; Okla. Stat. (1941) t. 58, § 5; Ore. Comp. Laws (1940) §§ 19-206 and 19-210; S. D. Code (1939) § 35.0101; Utah Code (1943) § 102-1-2; Wyo. Rev. Stat. (1931) § 88-207.

³¹ Ariz. Code (1939) § 38-101; Cal. Prob. Code (Deering, 1941) § 301; Idaho Code (1932) § 15-101; Ind. Stat. (Burns, 1933) §§ 6-201, 6-302 and 7-403; Mont. Rev. Code (1935) § 10018; N. Y. Surr. Ct. Act, § 45; N. C. Gen. Stat. (1943) § 28-1; Okla. Stat. (1941) t. 58, § 5; Ore. Comp. Laws (1940) § 19-206 and 19-210; S. D. Code (1939) § 35.0101; Utah Code (1943) § 102-1-2; Wash. Rev. Stat. (1932) § 1376; W. Va. Code (1943) §§ 4064 and 4123; Wis. Stat. (1943) § 253.03 (as to probate of wills); Wyo. Rev. Stat. (1931) § 88-207.

³² Ala. Code (1940) t. 61, §§ 35 and 80; Ind. Stat. (Burns, 1933) §§ 6-201, 6-302 and 7-403; Iowa Code (1939) §§ 10763 and 11825; Me. Rev. Stat. (1930) c. 75, § 9; Minn. Stat. (1941) § 525.82; N. Y. Surr. Ct. Act, § 45; N. C. Gen. Stat. (1943) § 28-1; Ore. Comp. Laws (1940) §§ 19-206 and 19-210; Tenn. Code (Michie, 1938) § 8145.

any debt or demand owing to him; ³³ (10) where the personal representative or kin of such person has a cause of action; ³⁴ or (11) where any suit in which the estate is interested is to be brought, prosecuted or defended.³⁵ And in most of them preference or priority is prescribed in a designated order, though all too often without regard to the convenience of anyone. In some instances the presence of land in the state gives precedence over personalty in the determination of venue.³⁶ In other statutes the very opposite is true.³⁷ It is not easy to reconcile these different forms or amounts of wealth as a basis for determining venue. The place of death itself would seem to bear no relation to the convenience of anyone insofar as the task of administration is concerned, and yet the county of death is designated as the venue in a surprisingly large number of states, due, no doubt, to the persistent influence of the English ecclesiastical courts, which sometimes authorized probate and administration in the diocese where death occurred.³⁸ The proximity of the executor, administrator and distributees to the assets of the estate would ordinarily serve their convenience better than an administration in a distant county compelled by the provisions of an arbitrary statute. The importance of this matter can be appreciated where property is to be looked after, rents collected, or a business continued or liquidated.

³³ Ark. Dig. Stat. (1937) § 14529; Fla. Stat. Ann. (1941) § 732.06; Ky. Rev. Stat. (1942) §§ 394.140 and 395.030; N. Y. Surr. Ct. Act, §§ 45 and 46; Ohio Gen. Code (Page, 1937) § 10511-4; R. I. Gen. Laws (1938) c. 569, § 3; Tenn. Code (Michie, 1938) § 8145.

³⁴ N. H. Rev. Laws (1942) c. 346, § 8; N. Y. Surr. Ct. Act, § 45.

³⁵ Tenn. Code (Michie, 1938) § 8145.

³⁶ Ark. Dig. Stat. (1937) §§ 5 and 14529; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 206; Ky. Rev. Stat. (1942) §§ 394.140 and 395.030; La. Civ. Code (Dart, 1932) art. 935; Miss. Code (1942) § 495 (probate of wills); Mo. Rev. Stat. Ann. (1942) §§ 4 and 531; N. M. Stat. (1941) § 33-103; Va. Code (1942) §§ 5247 and 5360; W. Va. Code (1943) § 4064.

³⁷ Colo. Stat. (1935) c. 176, § 71; Md. Code (1939) art. 93, §§ 15 and 356; Miss. Code (1942) § 525 (letters of administration); N. Y. Surr. Ct. Act, § 45.

³⁸ BURN, ECCLESIASTICAL LAW (9th ed. by Phillimore 1842) 292-293.

After the varied provisions of all the statutes are compared and considered, it seems clear that little advantage is to be gained by a rigid designation of venue. Choice within limits might well be left to those persons who will take the initiative in applying for letters and who will likely be appointed to undertake the task of looking after the estate.³⁹ A statute with flexible provisions permitting a degree of freedom may be considered as operating in a medium of individual choices; and in most cases individual choices will be guided largely by convenience.

Doubtless this objective has been paramount in those states having statutes authorizing probate and administration of the estate of a nonresident in any county in which assets of the decedent are located. The presence in any county of assets belonging or due to an estate is an essential and at the same time sufficient condition for a probate court to entertain proceedings for the administration of the estate of a nonresident.

II. POWER OF PROBATE COURTS TO DETERMINE VENUE

In order for a probate court to grant letters testamentary or of administration there must first be a showing of death. To invoke action by a particular probate court it must be shown secondly that the decedent was domiciled in the county at the time of his death, or, in the case of a nonresident (under the terms of many present statutes), that he died within the county

³⁹ One Texas statute goes so far as to permit administration in the county of applicant's residence where the only purpose is to appoint an administrator to receive funds from the federal government. *Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3293A*. A companion statute, based upon presumed convenience, *Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3293*, provides that administration on the estate of a nonresident decedent who died out of the state may be had in the county where his next of kin reside.

As the last of several enumerated places of venue in Missouri, probate and administration may be granted in any county in the state. *Mo. Rev. Stat. Ann. (1942) §§ 4 and 531*.

These are but isolated instances confined within a narrow compass.

or that some part of his property is located within the county.⁴⁰ The judicial determination of the existence of these facts is the basis upon which all subsequent proceedings depend. The important thing to observe in this connection is that the same tribunal which proposes to undertake the administration of an estate also passes upon the very facts necessary to entitle it to do so. This necessity and power to make such a determination corresponds to a similar necessity and power long recognized to exist in courts of general jurisdiction. And such a determination must conclude other courts in the same state.

These two facts are often called "jurisdictional facts."⁴¹ Only death is strictly a jurisdictional fact. If the alleged decedent were not dead, the proceedings purporting to administer and distribute his property would be wholly void.⁴² The second fact—of domicile within the county, or death within or the location of assets within the county in the case of a nonresident decedent—is not truly a jurisdictional fact, although many courts have so treated it, as will be pointed out presently. A court may entertain and allow an administration to proceed to completion, as if local domicile were a reality. At most the statutory directions for venue are violated. This is not deemed a serious error as long as there is no conflict with a probate court in another county, and it would serve no useful purpose to require a new and separate administration again in another county. Indeed positive harm is more likely to result if duplicate proceedings are permitted.⁴³ Consequently, a finding of this jurisdictional fact

⁴⁰ ATKINSON, WILLS (1937) § 205; 2 WOERNER, ADMINISTRATION (3d ed. 1923) §§ 204-207.

⁴¹ See 2 WOERNER, ADMINISTRATION (3d ed. 1923) §§ 204, 208.

⁴² *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894); ATKINSON, WILLS (1937) § 205; 2 WOERNER, ADMINISTRATION (3d ed. 1923) § 208. We are not here considering the statutes authorizing administration upon estates of absentees.

⁴³ For a case illustrating how far such conflicts may go, see *State ex rel. Carter v. Hall*, 141 Mo. App. 642, 125 S. W. 559 (1910) where one probate court

(domicile in the case of a resident or corresponding fact in the case of a nonresident) should be treated as binding and conclusive and not subject to collateral attack.⁴⁴ Any assault upon such a determination should be made directly or by appeal.

III. CONFLICTS OF VENUE

A. AS TO RESIDENT DECEDENTS

Despite the avowed purpose of statutes to limit the supervision of decedents' estates to one probate court, it is easily possible that administrations may be commenced independently in two or more counties within the same state more or less simultaneously. In the case of resident decedents it may be alleged and judicially determined by each of two or more probate courts that the decedent died domiciled in the same county where the court is located. This has happened in a number of instances. Let us look into the results of such competing jurisdictions.

In the first place this duplication, or possibly triplication, of effort is quite unnecessary. There is no justification for more than one tribunal to undertake the administration. In the second place an unseemly competition between two courts of equal jurisdiction is highly undesirable. Such judicial rivalry cannot be tolerated under any system. Furthermore, confusion, uncertainty and positive injustices may result. Each of two or more executors or administrators may seek to take possession of the same assets belonging to the estate; each may seek to recover debts owing to the estate. In either situation a person may be subjected to more than one action brought for the same purpose. An interpleader or correspond-

ordered an examination to discover assets held by the administrator to whom letters had been first granted in another county, and threatened contempt proceedings for refusal.

⁴⁴ Explicit statutes precluding collateral attack are now found in many states. See notes 66-78, *infra*.

ing remedy is possible for such a person, but he would be justified in feeling that a properly drafted probate code should eliminate such a possibility. Real estate titles traced through an administration may be subject to different paths and different ownerships, depending upon which administration is regarded as the controlling one. Such a condition still persists in Kentucky and Rhode Island.⁴⁵ It existed in Kansas until remedied by the probate code adopted there in 1939.⁴⁶ Many other states likewise formerly adhered to this view.⁴⁷

Where such a view prevailed in the past, one difficulty was no doubt due to the judicial construction of the local statutes, many of which were phrased in terms of "jurisdiction" rather than "venue." Residence was "jurisdictional" and always open to question. Thus the present statutes in Georgia,⁴⁸ Iowa,⁴⁹ Kentucky,⁵⁰ Maine,⁵¹ Massachusetts,⁵² Michigan,⁵³ Montana,⁵⁴ New York,⁵⁵ North Carolina,⁵⁶ North Dakota,⁵⁷

⁴⁵ *Miller v. Swan*, 91 Ky. 36, 14 S. W. 964 (1890); *People's Savings Bank v. Wilcox*, 15 R. I. 258, 3 A. 211 (1886). The same rule prevailed in Kansas prior to the adoption of the new probate code there in 1939. See *Ewing v. Mallison*, 65 Kan. 484, 70 P. 369 (1902); *Dresser v. Fourth Natl. Bank*, 101 Kan. 401, 168 P. 672 (1917); *In re Summerfield's Estate*, 158 Kan. 380, 147 P. (2d) 759 (1944). For a fuller citation of authority see ATKINSON, WILLS (1937) 560; 2 WOERNER, ADMINISTRATION (3d ed. 1923) 672; Evans, "The Venue of Probate Proceedings in Kentucky," 6 Ky. St. B. J. 13 (Dec. 1941).

The soundness of the Rhode Island position has recently been questioned by its supreme court in *Eckilson v. Greene*, 61 R. I. 394, 1 A. (2d) 117 (1938) in view of R. I. Gen. Laws (1938) c. 569, § 1 (enacted since the decision in the *Wilcox* case), to the effect that "The jurisdiction assumed in any case by the court, so far as it depends on the place of residence of a person, shall not be contested in any suit or proceedings except in the original case or an appeal therein or when the want of jurisdiction appears on the record."

⁴⁶ Kan. Gen. Stat. (Supp. 1943) § 59-2203. See also 2 BARTLETT, KANSAS PROBATE LAW AND PRACTICE (1939) § 999.

⁴⁷ See 2 WOERNER, ADMINISTRATION (3d ed. 1923) 673.

⁴⁸ Ga. Code Ann. (1936) § 113-603.

⁴⁹ Iowa Code (1939) § 10763.

⁵⁰ Ky. Rev. Stat. (1942) § 395.030.

⁵¹ Me. Rev. Stat. (1930) c. 75, § 9.

⁵² Mass. Ann. Laws (1932) c. 215, § 3.

⁵³ Mich. Stat. Ann. (1943) §§ 27.3178 (19) and (120).

⁵⁴ Mont. Rev. Code (1935) § 10018.

⁵⁵ N. Y. Surr. Ct. Act, §§ 44, 45, 46 and 47.

⁵⁶ N. C. Gen. Stat. (1943) § 28-1.

⁵⁷ N. D. Comp. Laws (1913) § 8526.

Ohio,⁵⁸ Oregon,⁵⁹ Virginia,⁶⁰ West Virginia,⁶¹ Wisconsin,⁶² and Wyoming⁶³ are unfortunately phrased in terms of jurisdiction. Where collateral attacks have been permitted, courts have treated domicile as jurisdictional.⁶⁴ But if such a statute is construed as a venue statute, as is now done in nearly all states, then the probate court first assuming jurisdiction over the administration of a resident decedent's estate by appropriate proceedings is entitled to retain such jurisdiction and to exercise it exclusive of every other probate court in the state.⁶⁵

When proceedings have been begun in two separate probate courts more or less simultaneously, the determination of priority may be simply resolved by requiring courts in which "proceedings are commenced" second in point of time to withhold action so long as jurisdiction over the estate has been assumed and continues to be exercised by the first court. In other words, such jurisdiction first assumed by one court is not subject to collateral attack. The applicable Wisconsin statute⁶⁶ is typical:

"The jurisdiction assumed by any county court in any case, so far as it depends on the place of residence of any person or the location of his estate, shall not be contested in any action or proceeding whatsoever except on appeal from the county court in the original case or when the want of jurisdiction appears on the same record."

The same language, in substance, is contained in the statutes of California,⁶⁷ Kansas,⁶⁸ Maine,⁶⁹ Massachusetts,⁷⁰ Mich-

⁵⁸ Ohio Gen. Code (Page, 1937) § 10504-15.

⁵⁹ Ore. Comp. Laws (1940) § 19-210.

⁶⁰ Va. Code (1942) § 5247.

⁶¹ W. Va. Code (1943) §§ 4064 and 4123.

⁶² Wis. Stat. (1943) § 253.03.

⁶³ Wyo. Rev. Stat. (1931) § 88-207.

⁶⁴ See Evans, "The Venue of Probate Proceedings in Kentucky," 6 Ky. St. B. J. 13 (Dec. 1941).

⁶⁵ Atkinson, "Old Principles and New Ideas Concerning Probate Court Procedure," 23 J. AM. JUD. SOC. 137 at 138 (1939).

⁶⁶ Wis. Stat. (1943) § 253.05.

⁶⁷ Cal. Prob. Code (Deering, 1941) § 302.

igan,⁷¹ Minnesota,⁷² New York,⁷³ North Carolina,⁷⁴ Ohio,⁷⁵ Oklahoma,⁷⁶ Rhode Island,⁷⁷ and Vermont.⁷⁸ Thus the first assumption of jurisdiction prevails and excludes subsequent action by other courts, subject to correction by three methods: (1) by revocation of letters in the first court; (2) by appeal from the decision of that court; or (3) by collateral attack when the "want of jurisdiction appears on the same record."

The application of these provisions against collateral attack would seem to prevent another probate court from granting letters on the same estate. But even though a second grant

⁶⁸ Kan. Gen. Stat. (Supp. 1943) § 59-223. The method used here provides for a stay in all courts except the first, until the question of venue is *finally* determined. See note 12 for form of this statute as it appears in the Model Probate Code.

⁶⁹ Me. Rev. Stat. (1930) c. 75, § 16.

⁷⁰ Mass. Ann. Laws (1932) c. 215, § 2. The statute of the form mentioned was superseded by the present statute in 1891 when probate courts were made courts of general jurisdiction. In *Kennedy v. Simmons*, 308 Mass. 431 at 432, 32 N. E. (2d) 215 (1941) it is stated that the former statute was no longer necessary because under the new statute the decrees of "probate courts were to be given the same effect as that usually attributed to those of a court of superior and general jurisdiction."

⁷¹ Mich. Stat. Ann. (1943) § 27.3178 (21).

⁷² Minn. Stat. (1941) § 525.82. This statute is like the Kansas statute cited in note 68, *supra*.

⁷³ N. Y. Surr. Ct. Act, § 44. The form of this statute differs from the others. "Jurisdiction, once duly exercised over any matter by a Surrogate's Court, excludes the subsequent exercise of jurisdiction by another Surrogate's Court over the same matter, . . . Where . . . letters testamentary or of administration have been duly issued from . . . a Surrogate's Court having jurisdiction, all further proceedings to be taken . . . with respect to the same estate . . . must be taken in the same court."

⁷⁴ N. C. Gen. Stat. (1943) § 28-2. "The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate."

⁷⁵ Ohio Gen. Code (Page, Supp. 1943) § 10504-15. The result in Ohio is implicit under this statute providing for notice and hearing and from which a right of appeal exists.

⁷⁶ Okla. Stat. (1941) t. 58, § 7. "The county court of the county in which application is first made for letters testamentary or of administration . . . excludes the jurisdiction of the county court of every other county."

⁷⁷ R. I. Gen. Laws (1938) c. 569, § 1.

⁷⁸ Vt. Pub. Laws (1933) § 2727. "When a probate court has first taken cognizance of the settlement of the estate of a deceased person, . . . such court shall have jurisdiction of the disposition and settlement of such estate to the exclusion of other probate courts." Vt. Pub. Laws (1933) § 2728 corresponds to the Wisconsin statute quoted above. See note 66, *supra*.

of letters is not contested, and thus not made the subject of attack, the probate court there should nevertheless defer or stay all action until the determination by the first court has become final. Thus if it should be duly determined in the first court, or on appeal from that court, that the decedent's domicile was not in its county, then the proceedings there should be dismissed, and the proceedings next begun in another county should continue. If perchance a third court were involved, the same rule as to stay should likewise apply to it. This idea of a positive duty on the part of other courts to stay proceedings first found form in the Minnesota statute⁷⁹ referred to above and was later embodied in the Kansas Probate Code⁸⁰ with one slight amendment. All this, of course, implies voluntary obedience by the courts which entertain proceedings later in point of time, or compulsory obedience by appropriate proceedings in a superior or supervisory tribunal.⁸¹ The net result is orderly procedure and the exercise of jurisdiction at any given time by one court only.

While this method may, in isolated instances, result in a determination of domicile, and hence place of administration, in a place not too convenient to some of the interested parties, it has the advantages of orderly procedure, the exercise of jurisdiction at any given time by one court only, the avoidance of duplication of function by the courts, and the prevention of more than one action against a debtor to the estate. Also the effect upon titles is salutary where conflict between courts cannot have more than momentary duration.

Perhaps it is not enough to say that when proceedings have been commenced in one court, similar proceedings shall be stayed elsewhere. It may be well to add that the jurisdiction assumed by the first court is not only exclusive and exhaustive but also that any action of a second court is void. The idea is

⁷⁹ Minn. Stat. (1941) § 525.82.

⁸⁰ Kan. Gen. Stat. (Supp. 1943) § 59-2203.

⁸¹ *State ex rel. Carter v. Hall*, 141 Mo. App. 642, 125 S. W. 559 (1910); *Sewell v. Christison*, County Judge, 114 Okla. 177, 245 P. 632 (1926).

implicit in the fundamental conception of probate jurisdiction that where one court assumes jurisdiction over the administration of an estate, the exercise of control by another court over such estate is thereby exhausted and any attempted or purported exercise of control by another court is void. In short, the power is exclusive; its exercise by one court exhausts the power, subject to the condition that if such court should relinquish its control over the estate, the power would be subject to exercise anew by another court.

B. AS TO NONRESIDENT DECEDENTS

In the case of resident decedents it has been observed that conflicts in jurisdiction may arise because of two or more independent determinations of domicile within the state. As far as any one state is concerned, it has been generally assumed that a person could have but one legal domicile within the state. Hence by some final determination, either in the probate court first entertaining jurisdiction or on appeal from that court, the fact of domicile will be determined so as to be binding throughout the state as far as that administration is concerned. In other words, only one court is entitled to undertake the administration in the first instance.⁸²

In the case of nonresident decedents there may be a real choice as to venue in two different situations. In addition there is a third situation in which each of two or more probate courts may undertake an administration proceeding approximately concurrently on the basis of an erroneous representation and a finding that the necessary factual basis for venue exists. Each of these situations contains the seeds for two or more simultaneous administrations with their attendant evils. Each deserves a method of resolution.

The first two present genuine choices open to those who may be interested in applying for administration. Thus one type of statute provides in effect that letters may be granted

⁸² ATKINSON, WILLS (1937) 560, 562.

in any county where the decedent left assets.⁸³ Companion statutes here frequently add that the court of that county in which application is first made, and which first grants letters or otherwise assumes jurisdiction, shall have exclusive jurisdiction;⁸⁴ or that "the jurisdiction assumed by any court, insofar as it depends on the location of the decedent's estate, shall not be contested except on appeal or when the want of jurisdiction appears on the record."⁸⁵ Another common type of statute in the western states modeled after the California Code specifies various bases of venue in categorical order and particularly provides that venue "in all other cases shall be in the county where application for letters is first made."⁸⁶ Both of these species of statutes providing for alternative places of venue, it will be noted, deal with cases where any one of several courts is entitled, in the first instance, to undertake the administration on a particular estate. Once proceedings have been commenced in any court, all the estate of

⁸³ See note 30, *supra*.

⁸⁴ Ariz. Code (1939) § 38-101; Cal. Prob. Code (Deering, 1941) § 301; Conn. Gen. Stat. (1930) § 4888; Del. Rev. Code (1935) § 3807; Idaho Code (1932) §§ 15-101 and 15-102; Ind. Stat. (Burns, 1933) § 6-302; Iowa Code (1939) § 11824; Kan. Gen. Stat. (Supp. 1943) § 59-2203; Me. Rev. Stat. (1930) c. 75, § 16; Mass. Ann. Laws (1932) c. 215, § 7; Mich. Stat. Ann. (1943) §§ 27.3178(22) and (120); Minn. Stat. (1941) § 525.82; Mont. Rev. Code (1935) §§ 10018 and 10019; Neb. Comp. Stat. (1929) § 30-313; Nev. Comp. Laws (Supp. 1941) § 9882.01; N. Y. Surr. Ct. Act, §§ 44 and 46; N. C. Gen. Stat. (1943) § 28-2; N. D. Comp. Laws (1913) § 8526; Ohio Gen. Code (Page, 1937) § 10511-4; Okla. Stat. (1941) t. 58, §§ 6 and 7; R. I. Gen. Laws (1938) c. 569, § 3; S. D. Code (1939) § 35.0102; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3294; Utah Code (1943) § 102-1-3; Vt. Pub. Laws (1933) § 2727; Wash. Rev. Stat. (1932) § 1377; Wis. Stat. (1943) § 253.04; Wyo. Rev. Stat. (1931) § 88-208.

⁸⁵ See notes 66-78, *supra*.

⁸⁶ A complete list of such statutes is as follows: Ariz. Code (1939) § 38-101; Cal. Prob. Code (Deering, 1941) § 301; Idaho Code (1932) § 15-101; Mont. Rev. Code (1935) § 10018; Nev. Comp. Laws (Supp. 1941) § 9882.01; N. D. Comp. Laws (1913) § 8526; Okla. Stat. (1941) t. 58, §§ 5-7; S. D. Code (1939) § 35.0101; Utah Code (1943) § 102-1-2; Wyo. Rev. Stat. (1931) § 88-207. This same result is implicit under the Kansas and Minnesota statutes, although not expressed in this manner. Likewise a similar construction obtains under the Texas and Washington statutes.

the decedent is brought under its jurisdiction and control,⁸⁷ and further jurisdiction in any other court is no longer possible. Resolution of the conflict here is sometimes, but not always, contained in the statute itself or in the companion statutes mentioned above. Priority in time determines the power to proceed.

The third possibility mentioned above in which conflicts are likely to occur, arises, to put an example, under statutes authorizing the administration of estates in the county where the land or estate of the nonresident decedent, or the greater part thereof, is located. Courts of two different counties may grant administration upon the belief that the greater part of the decedent's estate lies there. Mathematically the "greater" part may be in only one county, but before undertaking such measurement, such jurisdiction needs definition in terms of value, area, size, or some other appropriate measuring stick. Without pursuing this thought further, it is sufficient to point out that each of two or more courts may honestly believe itself justified in assuming jurisdiction according to its measurement of an extraneous fact upon which its jurisdiction is made to depend. Again we must fall back upon the simple expedient of recognizing that the first court to acquire juris-

⁸⁷ The term "jurisdiction" as used here refers merely to the power of a court to take cognizance of the proceedings and control over the property through the executor or administrator. Once the court assumes jurisdiction, its control extends to all property of the estate throughout the state. Ala. Code (1940) t. 61, § 87; Cal. Prob. Code (Deering, 1941) § 301; Conn. Gen. Stat. (1930) § 4888; Del. Rev. Code (1935) § 3807; Ind. Stat. (Burns, 1933) § 6-302; Iowa Code (1939) § 11825; Kan. Gen. Stat. (Supp. 1943) § 59-2203; Md. Code (1939) art. 93, § 16; Mass. Ann. Laws (1932) c. 215, § 7; Mich. Stat. Ann. (1943) § 27.3178 (120); Minn. Stat. (1941) § 525.82; Neb. Comp. Stat. (1929) § 30-313; Nev. Comp. Laws (Supp. 1941) § 9882.01; N. Y. Surr. Ct. Act, §§ 44-46; N. C. Gen. Stat. (1943) § 28-2; Ohio Gen. Code (Page, 1937) § 10511-4; Okla. Stat. (1941) t. 58, §§ 6, 7; R. I. Gen. Laws (1938) c. 569, § 3; S. C. Code (1942) §§ 211, 220; S. D. Code (1939) § 35.0102; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3294; Utah Code (1943) § 102-1-3; Vt. Pub. Laws (1933) § 2727; Wash. Rev. Stat. (1932) § 1377; Wis. Stat. (1943) § 311.01; Wyo. Rev. Stat. (1931) § 88-208.

diction is entitled to retain it,⁸⁸ subject to deprivation of that jurisdiction only in the manner indicated.

C. WHEN JURISDICTION IS ACQUIRED

In addition to the statutes which specify priority as between two or more *permissible* places of administration according to the county in which the application for letters is first filed,⁸⁹ many statutes provide that the court in which proceedings are "first commenced"⁹⁰ or "first legally commenced,"⁹¹ or the court "where administration is first lawfully granted"⁹² or which shall "first take cognizance thereof by the commencement of proceedings"⁹³ shall be entitled to retain jurisdiction over the administration of the estate to the exclusion of all other probate courts within the state. It is thereby intended to specify the time when a court acquires control and to declare an order of priority as between two or more courts. A definition of this precise point of time is essential whenever legal proceedings are in rem. This problem has been an acute one in states without any specific legislation on the subject as well as under the variously phrased statutes mentioned above. From an examination of the statutes and decisions it appears that there are two views as to just when a court acquires juris-

⁸⁸ *Bremer v. Lake Erie & W. R. R.*, 318 Ill. 11, 148 N. E. 862 (1925); *In re Estate of Kladio*, 188 Iowa 471, 176 N. W. 262 (1920); *Bolton v. Schriever*, 135 N. Y. 65, 31 N. E. 1001 (1892); *Sewell v. Christison*, County Judge, 114 Okla. 177, 245 P. 632 (1926). See statutes cited in note 87, *supra*.

⁸⁹ See notes 84 and 86, *supra*.

⁹⁰ Kan. Gen. Stat. (Supp. 1943) § 59-2203; Me. Rev. Stat. (1930) c. 75, § 16.

⁹¹ Minn. Stat. (1941) § 525.82.

⁹² Ala. Code (1940) t. 61, § 87; Del. Rev. Code (1935) § 3807; Ind. Stat. (Burns, 1933) § 6-302; Mich. Stat. Ann. (1943) § 27.3178(120); Neb. Comp. Stat. (1929) § 30-313; N. Y. Surr. Ct. Act, § 44 (but cf. § 46 wherein the time of filing the petition has been made the criterion); N. C. Gen. Stat. (1943) § 28-2 ("the clerk who first gains and exercises jurisdiction"); Ohio Gen. Code (Page, 1937) § 10511-4; R. I. Gen. Laws (1938) c. 569, § 3.

⁹³ Conn. Gen. Stat. (1930) § 4888; Iowa Code (1939) § 11824; Mass. Ann. Laws (1932) c. 215, § 7; Mich. Stat. Ann. (1943) § 27.3178 (22); N. Y. Surr. Ct. Act, § 44; Vt. Pub. Laws (1933) § 2727; Wis. Stat. (1943) § 253.04.

diction: (1) when the application or petition for letters is filed with the court; and (2) when the court, acting on the application, appoints an executor or administrator to administer the estate, thus assuming control over it.

The first view is predicated upon the theory that the proceedings are commenced by the filing of a petition for administration; and that the subsequent action of the court in acting on the petition is but a continuation and part of the proceedings already commenced. The simple lodging of the petition for letters vests the court with jurisdiction and control, precluding action by another court. A few statutes specifically provide that a probate proceeding may be commenced by filing a petition and causing it to be set for hearing.⁹⁴

The second view stems from the theory of *res judicata*, that where two actions involving the same issue are pending at the same time, the first one to be determined by final judgment shall control and may serve as a bar in any other action between the same parties involving that same issue.⁹⁵ This, of course, is a well-recognized rule of civil procedure. Judicial action, not the mere filing of a petition, is the *sine qua non* of jurisdiction.

It has also been said that a court can only acquire jurisdiction in an *in rem* proceeding by doing some act which is equivalent to seizing the *res*; that since a probate proceeding is *in rem*, no jurisdiction over the estate can exist until the court does some affirmative act amounting to a seizure, such as appointing a personal representative to take charge of the estate.

Undoubtedly in the vast majority of cases the court to

⁹⁴ Such statutes are found in New York, Kansas and North Dakota. See N. Y. *Surr. Ct. Act*, § 48; *Kan. Gen. Stat. (Supp. 1943)* § 59-2204; *N. D. Comp. Laws (1913)* § 8530; Minnesota formerly had such a statute, *Minn. Stat. (Mason, 1927)* § 8708, but neither this section nor any similar provision was adopted as a part of the Minnesota Probate Code of 1935. However, the same result will obtain under *Minn. Stat. (1941)* § 525.82. See note 97 *infra*.

⁹⁵ 2 FREEMAN, *JUDGMENTS* (5th ed. 1925) c. 10. See also *Sewell v. Christison*, County Judge, 114 Okla. 177, 245 P. 632 (1926).

which a petition is first presented will likewise be the first to grant letters. But such is not always the case, especially where notice for a hearing on the petition must be given for a specified minimum length of time. A second court to which a petition is later addressed may speed up its action to such a degree that it is the first to grant letters. Thus where the hearing and order are in reverse order to that of the filing of the applications, it becomes important to determine the precise time when jurisdiction may be said to attach so as to preclude jurisdiction by another court.

The authorities are divided in their views on this point. Among the states having statutes specifying jurisdiction upon the commencement of proceedings, or having no legislation on the subject, New York,⁹⁶ Minnesota,⁹⁷ Missouri,⁹⁸ Kansas,⁹⁹ North Dakota,¹⁰⁰ and Texas¹⁰¹ are committed to the first view, saying that the commencement of administration proceedings by the filing of a petition is conclusive as to the time when the court acquires jurisdiction;¹⁰² and that any subsequent proceeding in any other court is without jurisdiction and void. The New York statute, for example, pro-

⁹⁶ N. Y. Surr. Ct. Act, §§ 44, 45 and 46; *In re Daniel's Will*, 140 Misc. 89, 249 N. Y. S. 436 (1931); *In re Humpfner's Estate*, 146 Misc. 461, 263 N. Y. S. 309 (1933); *In re Feinberg's Estate*, 155 Misc. 844, 280 N. Y. S. 540 (1935).

⁹⁷ Minn. Stat. (Mason, 1927) § 8708; *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235, 127 Am. St. Rep. 523 (1908); *In re Estate of Martin*, 188 Minn. 408, 247 N. W. 515 (1933); *In re Gilray's Estate*, 193 Minn. 349, 258 N. W. 584 (1935).

⁹⁸ *In the Matter of the Estate of Greening*, 232 Mo. App. 78, 89 S. W. (2d) 123 (1936), noted in 1 MO. L. REV. 192 (1936). Here the court said that the order of appointment controlled, but that this related back to the "very inception of the proceedings" when the will and application for letters were filed.

⁹⁹ Kan. Gen. Stat. (Supp. 1943) § 59-2203.

¹⁰⁰ N. D. Comp. Laws (1913) § 8526.

¹⁰¹ *Stewart v. Poinboeuf*, 111 Tex. 299, 233 S. W. 1095 (1921).

¹⁰² In addition to these five states, there are some 24 additional states where statutes specify the time of application under certain circumstances as equivalent to the time when jurisdiction may be said to attach. See note 84, *supra*. This makes a total of 29 states where the filing of the application may be said to confer jurisdiction, at least to the extent of determining priority over other courts of coordinate authority.

vides that "jurisdiction, once duly exercised over any matter by a Surrogate's Court, excludes the subsequent exercise of jurisdiction by another Surrogate's Court over the same matter. . . ." It was held at a very early date under this statute that the presentation of a petition for probate, alleging residence of the decedent within the county, gives exclusive jurisdiction to try the question of residence, of which the court cannot be deprived by subsequent proceedings in the surrogate's court of another county.¹⁰³ In addition, statutes exist in twenty-eight states explicitly giving priority in given circumstances to the court in which an application for letters is first filed.

The second view also has its adherents. Delaware,¹⁰⁴ Indiana,¹⁰⁵ Nebraska,¹⁰⁶ New Hampshire,¹⁰⁷ Ohio,¹⁰⁸ Oklahoma,¹⁰⁹ Rhode Island¹¹⁰ and South Carolina¹¹¹ do not regard their probate courts as acquiring jurisdiction without some positive action, such as acting on an application by granting letters. Such judicial order or judgment, they say, is the only means by which the court may grasp jurisdiction.¹¹² A dozen applications may be pending in as many different courts, but jurisdiction exists in none until acted upon. Thus in an early California case it was said that the statute in effect at that time did not contemplate the "presentation of a petition as the

¹⁰³ *Matter of Buckley*, 41 Hun (N. Y.) 106 (1886). See REDFIELD, *LAW AND PRACTICE OF SURROGATES' COURTS IN NEW YORK* (4th ed. 1890) 116.

¹⁰⁴ Del. Rev. Code (1935) § 3807.

¹⁰⁵ Ind. Stat. (Burns, 1933) § 6-302.

¹⁰⁶ Neb. Comp. Stat. (1929) § 30-313.

¹⁰⁷ *Tilton v. O'Conner*, 68 N. H. 215, 44 A. 303 (1894).

¹⁰⁸ Ohio Gen. Code (Page, 1937) § 10511-4.

¹⁰⁹ *Sewell v. Christison*, County Judge, 114 Okla. 177, 245 P. 632 (1926). See also *Jackson v. Haney*, 166 Okla. 13, 25 P. (2d) 771 (1933), involving conflicting jurisdiction in the appointment of a guardian for a minor.

¹¹⁰ R. I. Gen. Laws (1938) c. 569, § 3.

¹¹¹ *Phoenix Bridge Co. v. Castleberry* (C. C. A. 4th, 1904) 131 F. 175.

¹¹² In the statutes of Delaware, Indiana and Nebraska, cited in notes 104, 105, and 106, *supra*, it is specifically provided that the administration first lawfully granted shall exclude the jurisdiction of every other court.

means of giving the Court jurisdiction," but as information to the court.¹¹³

In addition, statutes exist in Connecticut,¹¹⁴ Iowa,¹¹⁵ Maine,¹¹⁶ Massachusetts,¹¹⁷ Michigan,¹¹⁸ North Carolina,¹¹⁹ Vermont¹²⁰ and Wisconsin¹²¹ to the effect that the court which shall first take cognizance of the administration of an estate by the commencement of proceedings shall be entitled to retain it to the exclusion of every other court. Thus far, these statutes have received no clear judicial construction as to just when proceedings are commenced.

In favor of the first rule it has been said to be fairer to predicate priority on the filing of the first petition, provided the respective applications for administration have not been made with such haste as to suggest some positive fraud or collusion. As said in a Texas case:¹²²

"The fairest and most reasonable test is priority in invoking the exercise of jurisdiction. . . . The date of an adjudica-

¹¹³ In the Matter of the Estate of Howard, 22 Cal. 395 at 398 (1863). However, the court here was discussing two statutes entirely dissimilar to those under consideration. The sole purpose of quoting from the opinion is to indicate the early conception of the California court as to the office of the petition for probate. Indeed the opinion indicated that a petition was solely for the purpose of indicating to the court a willingness on the part of the executor to accept his trust.

¹¹⁴ Conn. Gen. Stat. (1930) § 4888.

¹¹⁵ Iowa Code (1939) § 11824.

¹¹⁶ Me. Rev. Stat. (1930) c. 75, § 16.

¹¹⁷ Mass. Ann. Laws (1932) c. 215, § 7. In addition to this section, another Massachusetts statute is unique in providing that "If it appears before final decree in any proceeding pending in a probate court that said proceeding was begun in the wrong county, said court may order the proceeding with all papers relating thereto to be removed to the probate court for the proper county, and it shall thereupon be entered and pending in the last mentioned court as if originally commenced therein, and all prior proceedings otherwise regularly taken shall thereupon be valid." Mass. Ann. Laws (1932) c. 215, § 8A.

¹¹⁸ Mich. Stat. Ann. (1943) § 27.3178(22). Cf. § 27.3178 (120) which gives priority to the administration first legally granted.

¹¹⁹ N. C. Gen. Stat. (1943) § 28-2. "The clerk who first gains and exercises jurisdiction . . . over the decedent's estate."

¹²⁰ Vt. Pub. Laws (1933) § 2727.

¹²¹ Wis. Stat. (1943) § 253.04. Cf. § 311.01 which gives priority to the administration first legally granted.

¹²² Stewart v. Poinboeuf, 111 Tex. 299 at 305, 233 S. W. 1095 (1921).

tion on his application may be delayed by circumstances beyond the applicant's control, such as the number of causes on the court's docket or time taken by the court to render a decision. One ought not to lose his right to an adjudication, properly sought, because a clerk or sheriff is delayed in issuing or serving process duly applied for, nor because an earlier adjudication is secured from another court."

Such a rule makes the acquisition of jurisdiction independent of the speed with which two probate courts might otherwise move toward acquiring jurisdiction by granting letters sooner than they would in the ordinary course of events. Where such application is for domiciliary administration and predicated upon domicile, fraud or collusion, if it exists, may be corrected in most cases in the probate court itself or by appeal.¹²³

If there is any weakness in the first view, it may be exemplified by supposing that the first of two courts in which application for letters has been filed, refuses to grant letters or otherwise proceed. The sudden cessation of a jurisdiction over the decedent's estate which the court says it never had, seems an anomaly. In answer it may be said that jurisdiction, or the potential power to assume jurisdiction, exists from the instant the application was filed, but the court terminates its jurisdiction and thus makes it possible for another court to take it up. This corresponds to the express statutory statement that proceedings may be commenced by the mere filing of a petition for probate or administration. Where such

¹²³ In addition to the remedy by appeal, the assumption of jurisdiction may always be questioned in the probate court directly, although the time for making such a direct attack varies in the different states. *Kennedy v. Simmons*, 308 Mass. 431, 32 N. E. (2d) 715 (1941) (at any time, by analogy of the common law and equity courts to correct their decrees by bill of review); *In re Estate of Neely*, 136 Me. 79, 1 A. (2d) 772 (1938) (even after appeal time); *Eckilson v. Greene*, 61 R. I. 394, 1 A. (2d) 117 (1938) (until the time for appeal has expired); *Hotchkiss v. Ladd's Estate*, 62 Vt. 209 (1890). Statutes in California and Maine make the grant of letters and assumption of jurisdiction final except on appeal, and not subject to collateral attack except for fraud. Cal. Prob. Code (Deering, 1941) § 302; Me. Rev. Stat. (1930) c. 75, § 16.

statutes exist, it cannot be denied that jurisdiction exists from the time the petition is filed.

The second view, based upon the doctrine of *res judicata*, has the support of history and of logical consistency. Under civil procedure two or more actions may pend between the same parties and involve the same issue. Ordinarily no serious harm results from the mere pendency of duplicate actions. The ultimate legal rights of the parties are not affected until final judgment. The same cannot be said of a probate proceeding, which is essentially a proceeding *in rem*.¹²⁴ The rights of parties interested in the estate are not affected merely by the decree of final distribution; they are affected by every step taken in the proceeding. In consequence, the jurisdiction of the court must attach at the commencement of the proceeding in order to insure that the court which undertakes to supervise administration of the estate has the exclusive jurisdiction and power to make all necessary orders. Otherwise we witness an unseemly race between courts of coordinate jurisdiction and a species of competition completely unworthy of the judicial process. As was aptly said in a recent Oklahoma case: "To hold that the time of appointment determines jurisdiction would . . . promote mad races between courts of coordinate jurisdiction to see which could enter a final order first. This would tend to discourage that deliberation so essential to a determination of the rights of parties in judicial tribunals."¹²⁵

In answer to the argument that the *in rem* character of the proceeding compels the conclusion that it is not initiated until the seizure of the *res*, two things may be said. First, this is

¹²⁴ ATKINSON, WILLS (1937) 438-440; Atkinson, "Old Principles and New Ideas Concerning Probate Court Procedure," 23 J. AM. JUD. SOC. 137 at 138 (1939); Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785 (1895).

¹²⁵ Jackson v. Haney, 166 Okla. 13 at 21, 25 P. (2d) 771 (1933). It should be stated that this quotation is from a concurring opinion written by a judge who believed that jurisdiction attached upon the filing of the petition for letters, contrary to the opinion held by the majority of the court. See note 109, *supra*.

a question of venue and not of jurisdiction, and if it is more convenient to say that the proceeding is commenced by the filing of the petition no unyielding principle of jurisdiction prevents such a statute. Second, whatever may be said as to a proceeding quasi in rem, there is no rule of law that seizure of the res is always necessary in order for a court to acquire jurisdiction in a proceeding strictly in rem.¹²⁶ The analogy of the admiralty proceeding is not and should not be followed in probate matters.

The provision of the Model Probate Code,¹²⁷ following the language of the Minnesota and Kansas Probate Codes,¹²⁸ has embodied the first view. It has not only expressed this view, but it has specifically provided what shall be done in other probate courts where proceedings have also been started. Such are to be stayed there pending a decision in the first court as to whether such proceedings are in a permissible county under the statute. If jurisdiction is assumed there, the second court, "after making and retaining a true copy of the entire file, shall transmit the original to the proper county." On the other hand, if the first court should decline to take jurisdiction, the second court becomes free to proceed.

Moreover, it is immaterial whether the proceedings first begun are "legal" or not. The question of domicile within the county, assets within the county, or other basis for ap-

¹²⁶ *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 410 (1900). See also 2 PAGE, WILLS, (3d ed. 1941) 38 where it is said:

"It is the presence of the thing within the state which confers jurisdiction in rem. It is sometimes said that the seizure of the thing is necessary; but this would seem to be taking a detail in the enforcement of the jurisdiction, which is quite necessary in the case of movable property but not so necessary in the case of immovable property, and turning it into a rule of jurisdiction. Fairness requires that some kind of notice be given so that those who have claims to the property may assert them in time. The due process clause of our constitution may make void or erroneous a decree which is rendered without such notice. It is not, however, the notice which gives the jurisdiction. It is the presence of the thing within the state."

¹²⁷ See note 12, *supra*.

¹²⁸ Minn. Stat. (1941) § 525.82; Kan. Gen. Stat. (Supp. 1943) § 59-2203.

propriate venue, or whether the first county is one of several counties in which administration might have been begun, is left for *final* decision in the first court to which an application is presented. But that decision is not necessarily limited to the original decision of this court. It may be redetermined on appeal or in the probate court itself by motion to revoke the letters.¹²⁹ By this means it is ordinarily possible for anyone to contest the first proceeding until a final conclusion is reached. But when the court in which proceedings are first filed renders a final decision that it has jurisdiction in the administration of the estate, that court is entitled to proceed, free from competition elsewhere in the state.¹³⁰

A Massachusetts statute¹³¹ permits a change of venue at any time before final decree if it appears that the proceeding was begun in the wrong county. Statutes in Arkansas¹³² are even broader, permitting removal of an administration from one county to another upon the petition of the personal representative or a majority of the heirs stating that the greater portion of the property is in such other county or that a majority of the heirs wish such removal. Such flexibility of venue for the administration of estates was not noted elsewhere, although a similar transfer of venue in guardianship proceedings exists in Minnesota.¹³³ Such provisions as these, although isolated, reflect a tendency to adjust probate procedure to the interests of convenience.¹³⁴

¹²⁹ See cases cited in note 123, *supra*.

¹³⁰ See the Minnesota and Kansas statutes cited in note 128, *supra*.

¹³¹ Mass. Ann. Laws (1932) c. 215, § 8A.

¹³² Ark. Dig. Stat. (1937) §§ 229-238.

¹³³ Minn. Stat. (1941) § 525.57. See also Cal. Prob. Code (Deering, 1941) § 1603 which provides that a guardianship proceeding may be transferred to "any other county which at the time of such transfer would have jurisdiction to issue original letters in such proceeding." In the case of a testamentary trust Cal. Prob. Code (Deering, 1941) § 1128 provides for a transfer of the trust proceedings upon petition of the trustees or any interested party stating the reasons for such transfer. Presumably convenience alone would be sufficient.

¹³⁴ The venue section of the Model Probate Code has been drafted to permit a **change of venue and transfer of proceedings** in the interest of convenience. See note 12, *supra*.

Dispensing with Administration*

Paul E. Basye

WITH an elaborate system existing in every state for the administration of decedents' estates, it should not be assumed that every estate is or need be subjected to official supervision by a probate court. According to studies made in this connection there is approximately one administration for every four deaths.¹ In some cases there is no estate to be administered. In others it is of such small value that administration is neither required nor justified. Even when a decedent dies possessed of a moderate or large estate, it does not follow that administration is absolutely essential. It is the experience of every lawyer that an administration in many estates is not needed. On the other hand, the opinion of many heirs and beneficiaries that an administration on the estate in which they are interested is or should be unnecessary is an erroneous one. The purpose of this study is to consider the precise circumstances which will justify dispensing with a formal administration, in whole or in part, on the estate of a decedent, and the extent to which modern legislation has specifically provided for its being dispensed with, or has favored or permitted "informal" or "unofficial" administrations.

The formal process of administration is peculiar to the common law. A personal representative was unknown to the Roman law and to the civil law. Under these systems

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The statutes which are discussed herein are complete to January 1, 1945. In addition all legislation passed during 1945 which was available at the time of printing is also included.

¹ Powell and Looker, "Decedents' Estates," 30 *COL. L. REV.* 919 at 922, 923 (1930); ATKINSON, *WILLS* (1937) 538-539 and notes 53-55.

the estate of the decedent passed directly to the heir in the event of intestacy or to the instituted heir where there was a will, without any intervening administration whatever as known to the common law.² Such an heir took the property absolutely but became personally liable for all debts of the decedent even though they exceeded the amount of property received.³ Only if the heir renounced the succession or claimed the benefit of inventory was he freed from liability for the decedent's debts.⁴ Thus the personality of the decedent was continued in the heir, and the decedent's estate passed immediately and absolutely to the heir who became liable for the payment of the decedent's debts and legacies given in the will. These obligations could be enforced as against the heir. In this light they might be regarded as administrative duties although not subjected to supervision by any court. It remained for the common law to develop the practice of appointing a personal representative accountable to the State to continue the personality of the decedent for a period long enough to insure the payment of his debts and any legacies provided for in the will.⁵ Thus court control over such a personal representative has led to the elaborate system of probate courts and supervision both in England and in America. The origin of this institution has been attributed⁶ to the desire to protect creditors and to secure the payment of fees and inheritance taxes—both legitimate interests of the sovereign.

The phenomenon of a complete lack of any official administration upon a decedent's estate under the civil law is described here in order to suggest a close analogy to those

² Rheinstein, "European Methods for the Liquidation of the Debts of Deceased Persons," 20 IOWA L. REV. 431 (1935).

³ Id. at 432-433.

⁴ Id. at 435-436.

⁵ Id. at 438.

⁶ Id. at 438.

situations in Anglo-American law in which there need be or is no formal administration.⁷ In this connection it will be observed that under the civil law the property of a decedent is never removed from commerce, whereas under our probate system it is largely taken out of commerce for the period of administration. Any worthy procedure of this kind should not impair too seriously the purposes for which administration is provided. At the same time it should be welcome both to heirs and distributees, and would advance the social interest of keeping property in commerce without substantial interruption upon the occasion of death.

There are two general situations in which administration might be dispensed with, either in the public interest or on behalf of those concerned in the estate. First, administration is scarcely justified in many small estates provided no one is adversely affected by its omission. This may be said of most estates of deceased minors; who have but limited capacity to contract debts and whose estates are likely to be small. Second, many estates of substantial amount may not require administration, if *all* the interested parties can resolve their conflicting interests among themselves. Each of these situations suggests the desirability of a careful and complete statement of the objectives to be achieved by an administration, how far each of them is secured only, or more effectively, by an administration, and to what extent administration may be dispensed with without seriously impairing the larger objectives.

I. FUNCTIONS OF ADMINISTRATION

Under the Anglo-American system of administration the title to a decedent's personal property passes to his executor

⁷ Id. at 468-475. This analogy is fully developed by Professor Rheinstein in the article cited. One should read it in full to appreciate the close parallels which prevail under the two systems.

or administrator for the period of administration. During that time his functions are: (1) to collect the assets belonging to the estate, (2) to pay the debts of the deceased and claims against the estate, and (3) to distribute the residue to the heirs or legatees. Each of these functions involves or may involve a resolution of conflicting interests. The collection of assets implies a positive duty on the part of the personal representative. Such is for the benefit of creditors as well as distributees of the estate, since a collection of assets may be necessary in order to pay creditors. At the same time the interests of distributees are opposed to those of creditors, inasmuch as the latter have a prior interest in the distribution of the estate. The payment of the debts of a decedent implies an opportunity for creditors to present and have a judicial determination of their claims and, in case of an insolvent estate, a resolution of the claims of competing creditors. The payment of claims against the estate (as distinguished from debts of the decedent) involves a determination and payment of funeral expenses, costs and expenses of administration, claims arising in connection with the carrying on of a decedent's business and whatever estate, inheritance or succession taxes, and other obligations which may be similarly classed. And finally the distribution of the residue to the heirs or legatees may involve a resolution of many kinds of conflicting interests, as between different classes of distributees and between distributees of the same class. It may also present problems of advancements, adoptions, contributions and the like.

The idea is fundamental in our system that some person occupying an official position under a supervisory court should perform these functions. This is due primarily to the state's solicitude for creditors of the decedent, and perhaps secondarily to the belief that only in this way can the residue of the estate be properly and justly distributed to those ultimately

entitled to it. The social and economic desirability of maintaining personal credit by the means of official administration has prevailed over the more direct method of the civil law. Furthermore, the complicated nature of property interests often makes it difficult, if not impossible, for the heirs or distributees to divide the decedent's property among themselves although they may be willing to do so. Our probate courts are maintained to effectuate the prompt settlement of estates and to resolve such conflicts as occur in the process. In a sense, an administration is a liquidation of the decedent's estate,⁸ affording creditors a means of realizing upon their claims and at the same time limiting the liability of the heirs who succeed to the property of the decedent.

II. PERSONS INTERESTED IN AND AFFECTED BY ADMINISTRATION IN TERMS OF STATED FUNCTIONS

The three general functions of administration having been stated, it remains to determine which groups of persons are interested in each of these objectives, to what extent the process of administration is essential for their accomplishment, and in what circumstances it could be dispensed with.

A. COLLECTION OF ASSETS

Upon the death of a decedent it is ordinarily desirable that someone take charge of his property and proceed to make collection of that which is not already in possession. This may be necessary in the interests of preserving the property and making it available for those ultimately entitled to it. It may involve the bringing of suits for the collection of debts

⁸ See Bordwell, "The Conversion of the Use Into a Legal Interest," 21 IOWA L. REV. 1 at 34 (1935); and dissenting opinion of Campbell, J., in *Lafferty v. People's Savings Bank*, 76 Mich. 35, 43 N. W. 34 at 45 (1889).

owed to the decedent. In each of these cases the heirs⁹ and creditors of the estate will be interested, because each aids in the realization of their respective claims upon the estate. If a debtor of the estate is willing to pay, he is entitled to know with certainty that the payment will operate to discharge his debt. Consequently each of the three classes of persons interested in the estate, heirs, creditors and debtors, is concerned in this function of administration. Under the system prevailing in many states at the present time, a debtor who pays the heirs directly may remain liable to a personal representative, if one is subsequently appointed.

B. PAYMENT OF DEBTS AND CLAIMS

Society's concern for creditors of the decedent has been the prime purpose in maintaining probate courts in which estates could be administered.¹⁰ If an heir proceeds to take possession of the decedent's property without administration, a creditor may petition the probate court for letters of administration and then present his claim for allowance in the administration proceeding. If, however, the heirs pay the creditor, he ceases to be an interested party to require administration or be concerned with the disposition of the property by the heirs. In providing machinery for liquidation of decedents' estates the state is said to be concerned in seeing that the assets shall be applied to the payment of debts and claims which otherwise might remain unpaid.

The heirs also are interested in having the assets of the estate applied to the discharge of claims against it. Otherwise their interest in the residual estate remains subject to the claims

⁹ The term "heirs" as used throughout this study is intended to include devisees and legatees as well as next of kin unless the context indicates to the contrary.

¹⁰ 2 WOERNER, ADMINISTRATION (3d ed. 1923) § 201.

of creditors. Only by the machinery of a formal administration can the existence of debts be determined and their payment provided for. And the claims of creditors will not ordinarily be barred by the statute of limitations in the absence of administration, for the running of the statute is ordinarily suspended between the date of the decedent's death and the time when a personal representative is appointed.¹¹ This interest on the part of the heirs is particularly significant where land is involved, because of the necessity for some effective judicial method to release it from the potential claims of creditors and permit it to become freely alienable, unencumbered by claims that are without foundation or are not asserted with reasonable promptness.

C. DISTRIBUTION OF RESIDUE

After the collection of assets and the payment of debts and claims against the estate, the heirs and legatees remain the sole interested parties in the remaining function to be accomplished, viz., the distribution of the residual estate to themselves. In most cases this involves a simple division of property among those entitled to it in accordance with their interests. In other cases it may involve a partition, or some kind of arbitrary allocation, of different pieces of property to different distributees. Where interests in property are more complex, the distributees themselves may desire an official distribution according to law or the provisions of the decedent's will.

In addition to securing a proper and satisfactory distribution to themselves, the distributees will doubtless have some occasion later to transfer the property so received by them. In

¹¹ *Id.* at § 401. See also comment, "Executors and Administrators—Comparison of Nonclaim Statutes and the General Statutes of Limitations," 36 MICH. L. REV. 973 (1938).

that event they will be much interested to know that the distribution has been an effective one and of such a character that it will be readily accepted by a purchaser. This is particularly true where the property is land, and it is true also for personal property which requires some kind of official or public recording for its transfer.

III. EXTENT TO WHICH FUNCTIONS OF ADMINISTRATION MAY BE ACCOMPLISHED WITHOUT ADMINISTRATION

A. ANTE-MORTEM DEVICES TO AVOID ADMINISTRATION

Many methods are available by which the use or right of enjoyment of wealth may pass to others at the time of a decedent's death without leaving an estate to be administered. The creation of inter vivos trusts and joint estates are both well recognized methods of accomplishing this end, although either of these devices may subject the property to inheritance taxes. Also, savings bank deposits naming other persons as beneficiaries are upheld in most states as another means of transmitting the beneficial enjoyment of property at death, which does not constitute a strict testamentary disposition. Insurance is another method, although the insured alone does not always, during his lifetime, create the fund which becomes payable to beneficiaries at the time of his death. In none of these cases is there any property which would become assets in the hands of a personal representative appointed to administer the decedent's estate.

In the absence of any fraud upon creditors at the time of creating any of these funds or estates, each of them is perfectly valid for the purpose intended. These methods operate to prevent an executor or administrator subsequently appointed from making a successful claim to the fund, and also to prevent

any claim by creditors of the decedent. There are, however, other devices which are often used to avoid administration but which, if discovered, are not valid to insulate the particular transactions from the claims of a personal representative or of creditors. Thus, fully executed deeds not delivered in the decedent's lifetime, endorsed securities and the like are often resorted to without being questioned. Or interested parties may simply appropriate unregistered property of a kind which may pass by delivery. But these latter devices are always dangerous and not immune from the claims of a personal representative or of creditors, if attacked.¹² Furthermore, unless a limitation exists on the grant of administration, such transactions ordinarily remain open indefinitely to the claims of creditors.

B. SUMMARY SETTLEMENT AFTER APPOINTMENT OF PERSONAL REPRESENTATIVE

Administration is often commenced when it is believed that an estate is larger than it turns out to be or when the total amount of assets is unknown. If it subsequently appears that the estate is not large and would be eventually distributable to the decedent's family in any event, there is a feeling that it should be made available to them at a time when their need for it is likely to be the greatest, and that the benefits of a formal administration should be available without requiring its usual procedure, formalities and duration. In such estates there can be no justification in subjecting the estate to the usual expenses of administration or in withholding delivery to the family until the expiration of the ordinary period for full administration. The following discussion is intended to consider existing statutes designed to accomplish this result.

¹² See Oswald, "Legal Efficacy of Attempted Methods of Avoiding Probate," 5 WASH. L. REV. 1 (1930).

In several states statutes already have been adopted to achieve this purpose, and they are becoming more widely acceptable with time.

1. *A method for small estates*

(a) *As dependent on family exemptions and allowances.* According to common custom, the rights of homestead and all exemptions enjoyed by the head of a household are transferred to and continued in the widow and minor children after his death.¹³ It is also usual to provide for a family allowance of a sum sufficient to provide for their maintenance and support during the period of administration and until distribution of the estate may be made to them.¹⁴ The amount of such allowance will naturally vary with the number of persons in the family, their standard of living and the size of the estate. In a few states there is also an allowance to the widow of a certain amount of money or other property as her absolute property and as such it is not considered a part of the estate.¹⁵ The property of the decedent, to the extent that it comprises the homestead or exempt property or is applied in payment of the family allowance or the widow's absolute property, is ordinarily not subject to the claims of creditors. Upon the setting off of the homestead and exempt property and the payment of a family allowance and widow's absolute property, there is a removal or withdrawal of these items of property from the estate for the purposes of administration.¹⁶ If the estate is thereby exhausted, there is no reason why the personal representative should not then render a final accounting and be discharged even though the usual period of ad-

¹³ See 3 VERNIER, AMERICAN FAMILY LAWS (1935) § 228; 1 WOERNER, ADMINISTRATION (3d ed. 1923) §§ 94-104.

¹⁴ 3 VERNIER, AMERICAN FAMILY LAWS (1935) 636-637; 1 WOERNER, ADMINISTRATION (3d ed. 1923) §§ 77-93.

¹⁵ 1 WOERNER, ADMINISTRATION (3d ed. 1923) §§ 77, 78, 82.

¹⁶ Bell v. Bell, 2 Cal. App. 338, 83 P. 814 (1905).

ministration has not expired. Creditors would not be aided and no useful purpose would be served by keeping the estate open longer.

A survey of existing legislation reveals that the statutes of Florida,¹⁷ Illinois,¹⁸ Kansas,¹⁹ Kentucky,²⁰ Minnesota,²¹ Missouri,²² Oregon,²³ Wisconsin²⁴ and Wyoming²⁵ provide for an early termination of administration in this manner. Not infrequently they provide that if it appears upon the return of the inventory that the estate does not exceed a homestead and exemptions, the court may order the same turned over or assigned to the widow and minor children and the personal representative discharged and the estate closed. Such an order operates to vest the persons entitled thereto with the complete title to the personal estate.²⁶

Some of these statutes include the family allowance or widow's absolute property in the list of items which can thus be used to exhaust the estate. Thus the Illinois statute provides for a summary distribution of the property of the estate when it does not exceed the amount of the widow's or child's award or both after the payment of first class claims, and for a discharge of the personal representative. This is also true of the Wisconsin statute. The Minnesota and Missouri statutes authorize such a procedure if the estate does not exceed the exemptions and allowances to the surviving spouse. The Oregon statute applies if the value of the estate does not exceed

¹⁷ Fla. Stat. Ann. (1941) § 734.08.

¹⁸ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 450.

¹⁹ Kan. Gen. Stat. (Supp. 1943) § 59-1507.

²⁰ Ky. Rev. Stat. (1944) §§ 395.460 and 395.490.

²¹ Minn. Stat. (1941) § 525.51.

²² Mo. Rev. Stat. Ann. (1942) § 249.

²³ Ore. Comp. Laws (1940) § 19-604.

²⁴ Wis. Stat. (1943) § 311.04, to be renumbered Wis. Stat. (1945) § 311.05.

²⁵ Wyo. Rev. Stat. (1931) § 88-2905 (amended by Wyo. Laws 1943, c. 105, § 5).

²⁶ Such is the effect of all of these statutes. See *Bell v. Bell*, 2 Cal. App. 338, 83 P. 814 (1905).

\$150 over and above the exempt property. This \$150 allowance is thus available to provide a small fund from which funeral and administration expenses may be paid, since distribution is made subject to their payment.

The recent Florida statute²⁷ on this subject is representative of the best in draftsmanship and contains the following clear and concise statement both of function and procedure:

"If at any time during the course of administration it shall be made to appear . . . that the estate does not consist of more than the homestead and exempt personal property of the decedent, the county judge may thereupon direct and order the distribution of said estate among the persons entitled to receive the same and upon said distribution may thereupon enter his order relieving, releasing and discharging the personal representative."

(b) *As dependent on size of estate.* A similar type of statute designed to accomplish the same purpose is predicated upon the size of the estate rather than upon its exhaustion by setting off the homestead, exemptions and widow's absolute property, and payment of a family allowance. The total value of property left by the decedent, irrespective of whether real or personal and whether within the technical scope of homestead and exempt property, determines the applicability of the statute. Such statutes are particularly common in the western states which have patterned their probate laws after the California Code.

The California Probate Act of 1851²⁸ provided for a summary procedure of this kind whenever it appeared upon the return of the inventory that the value of the whole estate of an intestate did not exceed \$500. In this event the court was to assign it by decree for the use and support of the decedent's

²⁷ Fla. Stat. Ann. (1941) § 734.08.

²⁸ Cal. Laws, 1851, p. 464, § 126, now Cal. Prob. Code Ann. (Deering, 1944) § 642.

widow and minor children. Thereafter, the Act provided, "there shall be no further proceedings in the administration, unless further estate be discovered." The amount was raised to \$1,500 in 1871,²⁹ and to \$2,500 in 1921.³⁰ In connection with the amendment of 1871 which raised the amount to \$1,500, a note of the commissioners states that "The distinction is too great between the *family* of *one* who has *invested in real property* and happens to own it when he dies, and one who, not so provident, or it may be more conscientious towards his creditors than careful of his family, has provided no homestead. Again, but few estates which do not amount to more than \$1,500, could pay the expenses of administration. In any such cases, it is better that the family enjoy it than to spend it in useless administration."³¹ The distinction to which the commissioners referred is between estates which included homesteads, which were exempt up to \$5,000, and those which included personal property only.

The net result of this new statute is to carry forward for the benefit of the surviving family of the decedent a new kind of exemption, made up of a stated maximum amount for the use and support of the family, and exempt from the claims of the decedent's creditors. An estate consisting of property not exceeding this value is thus made available to the surviving family even though all of it would not qualify as exempt to the decedent during his life. Under ordinary circumstances one who has acquired a homestead is accorded exemptions different from another who has acquired an equivalent amount of wealth solely in personal property. Statutes of the kind under consideration provide a measure of economic security to the family of a decedent whose wealth exceeds ordinary

²⁹ 2 Cal. Code Civ. Proc. (1872) p. 204, § 1469.

³⁰ Cal. Stats., 1921, c. 109, p. 101.

³¹ 2 Cal. Code Civ. Proc. (1872) p. 205, note to § 1469.

exemptions but who has not acquired a homestead, comparable to that of the family which has invested its wealth in a homestead.

Legislation similar to the California statute exists in Arizona,³² Idaho,³³ Indiana,³⁴ Michigan,³⁵ Montana,³⁶ North Dakota,³⁷ Oklahoma,³⁸ Oregon,³⁹ Pennsylvania,⁴⁰ Washington⁴¹ and Utah.⁴² The Arizona statute applies to estates not exceeding \$2,000; the Idaho, Montana, North Dakota, Oklahoma and Utah statutes to estates not exceeding \$1,500. These latter were doubtless taken from the California statute at various periods between 1871 and 1921 when the amount of \$1,500 prevailed in California. The Washington statute, on the other hand, allows property up to \$3,000 to be set off to the surviving spouse which shall include the home and household goods.

An Indiana statute authorizes a summary distribution to a surviving widow if an executor or administrator shall discover that the whole estate of the decedent is not worth over \$500, exclusive of mortgages, bona fide liens or other encumbrances.

In Michigan, letters may be issued without notice where a decedent is survived by a widow or widower, or children under

³² Ariz. Code (1939) § 38-905.

³³ Idaho Laws Ann. (1943) § 15-506.

³⁴ Ind. Stat. (Burns, 1933) § 6-1703.

³⁵ Mich. Stat. Ann. (1943 and Supp. 1945) §§ 27.3178(448), 27.3178(449), 27.3178(450).

³⁶ Mont. Rev. Code (1935) § 10149 (amended by Mont. Laws 1941, c. 57).

³⁷ N. D. Rev. Code (1943) §§ 30-1701 to 30-1706.

³⁸ Okla. Stat. (1941) t. 58, § 317. It has been held that only personal property may be set off under this statute. *Minnery v. Thompson*, 146 Okla. 72, 293 P. 231 (1930).

³⁹ Ore. Comp. Laws (1940) § 19-604. This statute includes estates which do not exceed \$150 over and above exempt property. Thus it partakes partly of the nature of the statutes previously discussed.

⁴⁰ Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 863.

⁴¹ Wash. Rev. Stat. (1932) § 1473.

⁴² Utah Code (1943) § 102-8-2.

the age of sixteen years, or by both, and leaves only personalty having a value not exceeding \$500. After the payment of the funeral expenses the estate may be distributed to the widow or guardian of the minor children, and the personal representative discharged without further accounting or notice.

The Pennsylvania statute applies to estates not exceeding \$500 in value. One aspect of this statute gives it the appearance of being based in fact upon an exemption statute, since a widow under Pennsylvania law is entitled to an exemption of this precise amount.⁴³ However, this statute applies to any decedent and not merely to a deceased husband. Final settlement and distribution in such small estates is authorized after six months.

The first group of statutes making summary distribution dependent upon the exhaustion of the estate in setting off the homestead and exempt property is not radically different from the second group predicated upon the size of the estate measured in terms of a stated monetary value. However, they do contain certain different theoretical bases and have somewhat divergent applications. The idea of the former is merely to carry forward the immunities formerly possessed by the head of the household and nothing more. The latter, on the other hand, is predicated upon the idea that a family allowance of a minimum amount should be devoted to the continued maintenance and support of the family even to the exclusion of creditors. In the language of the Supreme Court of Washington in *In re Lavenberg's Estate*,⁴⁴ "They sound deeper in the policies upon which homestead and exemption laws are made to rest." They are designed to continue for a

⁴³ Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 471.

⁴⁴ 104 Wash. 515 at 517, 177 P. 328 (1918). See also *Estate of Woodburn*, 212 Cal. 683, 300 P. 22 (1931), in which it was pointed out that this statute was derived from that part of the California Code of Civil Procedure expressly relating to the support of the family.

period the maintenance of the family as the decedent did during his lifetime. The law is said to step into his shoes and to make the same provision for his family. The North Dakota statute, however, has been construed as a new kind of exemption statute, providing *additional* property to the head of the surviving family.⁴⁵

As might be expected, this right of summary distribution is superior to the power of testamentary control.⁴⁶ The primary function of such statutes is to pass small estates to the surviving spouse and minor children free from the claims of creditors and with the least possible expense and delay, consistent with the rights of any other persons who may be interested in the estate.⁴⁷

In the application of the second group of statutes described, some question has arisen as to what property is to be included in ascertaining whether the value of the estate is less than the amount named. It is generally held that a homestead is not to be included.⁴⁸ All other real and personal property located within the state is included.⁴⁹ If property is subject to a lien or encumbrance, only its net value is considered, and it is as-

⁴⁵ See *Woods v. Teeson*, 31 N. D. 610, 154 N. W. 797 (1915).

⁴⁶ *In re Walkerly's Estate*, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97 (1895); *In re Miller's Estate*, 158 Cal. 420, 111 P. 255 (1910); *McMillan v. Boese*, 45 Cal. App. (2d) 764, 115 P. (2d) 37 (1941). The Utah statute, however, expressly permits the testamentary disposition of homestead and exempt property. *In re Schenk's Estate*, 53 Utah 381, 178 P. 344 (1919).

⁴⁷ *De Ledesma v. Stanley*, 57 Cal. App. 470, 207 P. 693 (1922); *Estate of Neff*, 139 Cal. 74, 72 P. 632 (1903). In general on this point see 2 WOERNER, ADMINISTRATION (3d ed. 1923) 668-669.

⁴⁸ *Johnson v. Jones*, 55 Ariz. 49, 97 P. (2d) 933 (1940); *Estate of Neff*, 139 Cal. 71, 72 P. 632 (1903); *In re Shirey's Estate*, 167 Cal. 193, 138 P. 994 (1914); *In re Adamson's Estate* (Cal. 1910), 5 Cof. Prob. Dec. 397. According to the preceding decisions distributive rights under these statutes are superior to homestead if the decedent's estate is less than the amount specified and includes the homestead. In Utah, however, homestead property is apparently included in the total estate in computing its value to determine the applicability of this statute, and in any event it is made subject to the payment of expenses of last illness, funeral and administration. *In re Thorn's Estate*, 24 Utah 209, 67 P. 22 (1901); *In re Mower's Estate*, 93 Utah 390, 73 P. (2d) 967 (1937).

⁴⁹ *In re Bruhns' Estate*, 58 Mont. 526, 193 P. 1114 (1920); *In re Jarrett's Estate*, 138 Wash. 404, 244 P. 694 (1926).

signed or distributed subject to such liens or encumbrances.⁶⁰ In those states providing for community property ownership it is also said to be immaterial whether the property is separate or community property.⁶¹ In Arizona, however, an amendment to the statute in 1935 expressly excluded the one-half interest to which the surviving spouse is entitled in the community property.⁶² The statutes of both types are almost unanimous in providing that funeral charges, expenses of the last illness and expenses of administration shall be satisfied before the residue of the estate may be paid to those entitled.⁶³ To this extent the rights of the family are subordinated to those of preferred claimants. And it has been held in several cases that this right of the surviving members

⁶⁰ This provision is a part of each of the statutes under consideration. But a widow cannot pay funeral expenses and expenses of the decedent's last illness in order to reduce the "net estate" to less than \$1,500. *Columbia Trust Co. v. Anglum*, 63 Utah 353, 225 P. 1089 (1924). Nor can she obtain her widow's allowance in order to reduce the estate to a value less than \$1,500. *In re Schenk's Estate*, 53 Utah 381, 178 P. 344 (1919). The statutes contemplate the entire estate being subject to administration. While general creditors of the decedent may not look to encumbered property so set off, it does not follow that such creditors having a mortgage, lien or other encumbrance on such property may not subject it to the satisfaction of their claims. *Fairbanks v. Robinson*, 64 Cal. 250, 30 P. 812 (1883). See also *In re Stone's Estate*, 14 Utah 205, 46 P. 1101 (1896); *In re Farmer's Estate*, 17 Utah 80, 53 P. 972 (1898). But a judgment or execution creditor does not have such a specific lien upon property as to entitle him to precedence over the surviving family. *Snyder v. Thieme & Wagner Brewing Co.*, 173 Ind. 659, 90 N. E. 314 (1910); *Turner v. Hammerle*, 153 Ind. App. 437, 101 N. E. 827 (1913). Nor may a debtor of the decedent purchase an outstanding claim against a decedent after his death and use it as a set-off, for this would defeat the widow's right in the minimum of property allotted to her under the statute. *Haugh v. Seabold*, 15 Ind. 343 (1860).

⁶¹ *In re Leslie's Estate*, 118 Cal. 72, 50 P. 29 (1897).

⁶² *Ariz. Code* (1939) § 38-905. For a case under the prior statute see *Johnson v. Jones*, 55 Ariz. 49, 97 P. (2d) 933 (1940) which held that the amount specified in the statute applied both to community and separate property.

⁶³ "Certainly the legislature, in exacting these provisions of law, could not have intended that the expenses of the last sickness, funeral charges, and expenses of administration should not be a proper charge against small estates, merely consisting of a homestead of less than \$1,500 in value. Such a rule would pauperize an intestate upon his deathbed, and tend to deprive him of a Christian burial, though the means he may have acquired and accumulated by years of toil were sufficient to pay them." From opinion in *In re Thorn's Estate*, 24 Utah 209, 67 P. 22 (1901).

of the family to the beneficial results contemplated by the statute cannot be given effect unless these prior expenses have first been satisfied.⁵⁴ In Kansas⁵⁵ and Minnesota⁵⁶ expenses during the last sickness and debts having preference under the laws of the United States or the state are included among the preferred charges. In Florida, however, it has been held that the surviving widow of a decedent is entitled to distribution of an estate of some \$626 as exempt property even though funeral expenses are left unpaid.⁵⁷ A literal interpretation of the Kentucky⁵⁸ and Wyoming⁵⁹ statutes would indicate a like result.

Some variation is found as to the persons entitled to the benefits of such summary distribution statutes. Most of the early statutes confined their benefits to the surviving widow and minor children. This was true of the California Probate Act of 1851 after which so many of the others have been patterned. But a few states have recently broadened their statutes to include either spouse who survives.⁶⁰ The California statute was amended only in 1939 to make its provisions applicable to either spouse.⁶¹ Domicile in the state is

⁵⁴ *Estate of Parr*, 24 Cal. App. (2d) 171, 74 P. (2d) 792 (1937); *Ross v. Smith*, 47 Ill. App. 197 (1893); *In re Thorn's Estate*, 24 Utah 209, 67 P. 22 (1901); *In re Petersen's Estate*, 69 Utah 484, 256 P. 409 (1927); *In re Mower's Estate*, 93 Utah 390, 73 P. (2d) 967 (1937). According to the case last cited even the homestead property may be subject to these claims if there is not sufficient other property to pay them.

⁵⁵ Kan. Gen. Stat. (Supp. 1943) § 59-1507 (also mentions wages of servants during the last sickness).

⁵⁶ Minn. Stat. (1941) § 525.51.

⁵⁷ *Seashole v. O'Shields*, 139 Fla. 839, 191 So. 74 (1939).

⁵⁸ Ky. Rev. Stat. (1944) §§ 395.460, 395.490.

⁵⁹ Wyo. Rev. Stat. (1931) § 88-2905 (amended by Wyo. Laws 1943, c. 105, § 5).

⁶⁰ This is true in the present statutes of Arizona, California, Kansas, Minnesota, Missouri, North Dakota, Pennsylvania, Utah, Washington and Wyoming. Under the former Utah statute the wife could not mortgage the interest of the children in the property so set off to her for the joint use of all. *Booth Mercantile Co. v. Murphy*, 14 Idaho 212, 93 P. 777 (1908).

⁶¹ Cal. Stat. 1939, pp. 2390-2392.

not a prerequisite.⁶² And in any event the status of a person at the time of the order for summary distribution is the controlling circumstance. Thus the heirs of a widow who died before a final determination of her rights were held not to be entitled to the benefits of such statutes.⁶³ And a wife who abandoned her husband without cause was held to have barred herself of the right to his support and to the provisions of the statutes authorizing summary distribution to a surviving spouse.⁶⁴ But an interlocutory decree of divorce will not of itself deprive a surviving wife of these provisions; she must also have lost her right by some fault of her own to receive support and maintenance from her husband and have ceased to be a member of his family.⁶⁵ Nor will an antenuptial contract bar a widow in claiming the benefits intended by these statutes.⁶⁶

Similarly in determining the propriety of setting off the estate to the surviving spouse or family of the decedent, the value of the estate at the time of the hearing and order, rather than at the time of the inventory, will control.⁶⁷ In a world of rapidly changing values this becomes important upon occasions.

Distribution is usually made to the surviving spouse alone who has the obligation to support any minor children.⁶⁸ How-

⁶² *In re Lavenberg's Estate*, 104 Wash. 515, 177 P. 328 (1918); *In re Jarrett's Estate*, 138 Wash. 404, 244 P. 694 (1926).

⁶³ *Estate of Bachelder*, 123 Cal. 466, 56 P. 97 (1899).

⁶⁴ *In re Bose's Estate*, 158 Cal. 428, 111 P. 258 (1910).

⁶⁵ *In re Boeson's Estate*, 201 Cal. 36, 255 P. 800 (1927).

⁶⁶ *Woodburn's Estate*, 212 Cal. 683, 300 P. 22 (1931). The widow's rights under these statutes are here declared to be "in no sense either the rights of inheritance or rights depending upon any previous interest in the property of the decedent owned by him during his lifetime, and which she may or may not have surrendered by virtue of the terms of their antenuptial agreement."

⁶⁷ *In re Orosco's Estate*, 60 Ariz. 266, 135 P. (2d) 217 (1943). In this case the inventory showed an estate of \$2,200. Upon the hearing of a petition by a surviving husband to have it set off to him, the court found that it was less than \$2,000 and awarded it to him in its entirety.

⁶⁸ *Johnson v. Jones*, 55 Ariz. 49, 97 P. (2d) 933 (1940); *McGuire v. Lynch*, 126 Cal. 576, 59 P. 27 (1899); *In re Stuart's Estate* (Cal. 1909), 5 Cal. Prob. Dec. 270; *Estate of Neff*, 139 Cal. 71, 72 P. 632 (1903).

ever, the survival of minor children is not at all necessary to entitle the surviving spouse to the benefits of this summary distribution.⁶⁹ However, if there is no surviving spouse, the minor children are entitled to the estate.⁷⁰ Some of the early statutes made the property distributable to the surviving widow and children, one half to the widow and the other half to the children equally, but this has now been changed so as to give the widow the exclusive right if she survives.⁷¹ In many cases this eliminates an unnecessary guardianship.

There is one rather unusual feature of the California statute⁷² and those of Arizona⁷³ and Utah⁷⁴ patterned after it. They provide that a surviving spouse who has separate estate of a specified amount, shall not be entitled to summary distribution of such property. This would seem to imply that behind the application of the statute is the policy of making it subservient to the continued support of the family. Thus, if the surviving spouse has sufficient independent wealth or separate property, the benefits contemplated by the statute do not exist and the estate of the decedent is administered and distributed in the usual manner. The California statute specifies that summary distribution shall be denied if the surviving spouse or minor child has other estate of \$5,000 in value. Similarly in Arizona, if the surviving spouse has separate property, exclusive of his one-half interest in the community property, equal to the portion to be set apart to him,

⁶⁹ *McGuire v. Lynch*, 126 Cal. 576, 59 P. 27 (1899); *Woods v. Teeson*, 31 N. D. 610, 154 N. W. 797 (1915).

⁷⁰ Most of the statutes so provide. Where the decedent was the wife, her small estate was set off to the minor children to the exclusion of the surviving husband under the former California statute. In *re Leslie's Estate*, 118 Cal. 72, 50 P. 29 (1897).

⁷¹ *McGuire v. Lynch*, 126 Cal. 576, 59 P. 27 (1899); *Stuart's Estate* (Cal. 1909), 5 Cof. Prob. Dec. 270.

⁷² Cal. Prob. Code Ann. (Deering, 1944) §§ 645, 646. This provision was added to the California statute in 1929. See Cal. Stat., 1929, c. 109, p. 196.

⁷³ Ariz. Code (1939) § 38-905.

⁷⁴ Utah Code (1943) § 102-8-2.

the whole property, other than his half of the homestead, shall go to the minor children. The Utah Code permits the court, in its discretion, to exclude from any such distribution any surviving wife, husband or minor child having either separate property or income.

In setting off an estate to the surviving spouse or minor children under the provisions of these statutes, no special notice to creditors is required or contemplated.⁷⁵ Their interests are not involved. But any person who will be adversely affected by such a proceeding may offer certain objections thereto. Thus such a person will be allowed to show that the estate exceeds in value the amount claimed or that all of the property has not been inventoried.⁷⁶

Once an order is made setting off the estate, it cannot be attacked collaterally except for extrinsic fraud.⁷⁷ Thus the marital status of the surviving spouse will not be re-examined⁷⁸ or the property reappraised in another proceeding.

2. *Accelerated distribution to executor who is residuary legatee*

When the executor named in a will is also the residuary legatee, statutes in a few states,⁷⁹ in lieu of requiring the executor to give a bond that he will faithfully perform the duties of his office and account for all property which may

⁷⁵ *Wills v. Booth*, 6 Cal. App. 197, 91 P. 759 (1907); *Estate of Palomares*, 63 Cal. 402 (1883); *Estate of Atwood*, 127 Cal. 427, 59 P. 770 (1900); *Browne v. Sweet*, 127 Cal. 332, 59 P. 774 (1899).

⁷⁶ *Estate of Roach*, 208 Cal. 394, 281 P. 607 (1929).

⁷⁷ *Eisenmayer v. Thompson*, 186 Cal. 538, 199 P. 798 (1921); *McMillan v. Boese*, 45 Cal. App. (2d) 764, 115 P. (2d) 37 (1941); *Johnson v. Johnson*, 53 Cal. App. (2d) 805, 128 P. (2d) 617 (1942).

⁷⁸ *Johnson v. Johnson*, 53 Cal. App. (2d) 805, 128 P. (2d) 617 (1942).

⁷⁹ *Mass. Ann. Laws* (1932) c. 205, § 3; *Mich. Stat. Ann.* (1943) § 27.3178 (254); *Neb. Rev. Stat.* (1943) § 30-305; *N. H. Rev. Laws* (1942) c. 352, § 14; *R. I. Gen. Laws* (1938) c. 576, § 2; *Vt. Pub. Laws* (1933) § 2779; *Wis. Stat.* (1943) § 310.15 (sole or residuary legatee); *Wyo. Rev. Stat.* (1931) § 88-107 (sole legatee).

come into his hands, permit him to give a bond for the payment of all claims⁸⁰ against the estate and the legacies provided for in the will. Under some of these statutes he may then be relieved of filing an inventory⁸¹ or rendering any accounting.⁸² The bond given by him is regarded as being an adequate protection to creditors and legatees who are deemed to be no longer interested in knowing the extent of assets contained in the estate or in having a formal accounting.⁸³ In return for being allowed to give this kind of bond, which frequently will be much less than the amount of bond ordinarily required, the executor becomes personally liable for all debts of the decedent and all legacies given in the will even though they exceed the amount of property which he receives from the estate.⁸⁴ To the extent indicated there is a slight relaxation of the control over the executor in an effort to minimize his duties.

Between 1819 and 1884 a line of decisions construed such statutes as giving such residuary legatee the right to immediate distribution or as giving him immediate ownership of the property upon the approval of the bond to pay claims and legacies. These decisions were based upon the theory that the administration was thereby terminated and that the executor thereafter carried out the terms of the will independently of judicial supervision. "There is no longer a proceeding in rem," said Judge Cooley, "for the res disappears when the estate passes from the control of the probate court and becomes merged in the individual estate of the

⁸⁰ The term "claims" is used here to include debts, funeral expenses, and expenses of administration. Some statutes have added inheritance taxes and family allowance as items to be included in the conditions of the bond.

⁸¹ In Massachusetts, Nebraska and Rhode Island. In Vermont an inventory must be returned within three months.

⁸² In Rhode Island. In New Hampshire an accounting is to be made only "when required."

⁸³ See *Hatheway v. Weeks*, 34 Mich. 237 (1876).

⁸⁴ *Hatheway v. Weeks*, 34 Mich. 237 (1876); *McElroy v. Hatheway*, 44 Mich. 399, 6 N. W. 867 (1880).

executor himself. What before was a *jus ad rem* in the creditor, to be enforced by the aid of the probate court as a lien upon an estate in its charge, becomes now a personal obligation of the executor and his sureties, attaching itself to no specific property, and concerning no other persons whomsoever. The court has no power, for the purpose of enforcing this obligation, to follow the property which before constituted the assets of the testator; and the heirs, the beneficiaries under the will, or the creditors, are not to be summoned when the demand is to be proved, because they have no interest in the question of its proof, and therefore no right to be heard upon it."⁸⁵ Such a conception of the function of a residuary legatee's bond was a close approximation to the instituted heir under the civil law system, making the residuary legatee and all his property, including that received from the testator, subject to claims of the decedent's creditors.⁸⁶ However, this idea of the function of such statutes was ultimately proved to be erroneous. But, while it prevailed such a procedure was the equivalent of a summary administration.

These statutes derive originally from an act of the Massachusetts Bay Colony. In 1685 it was provided that the court might require any executor to give bond with sufficient sureties for paying all debts and legacies or to make and exhibit a just and true inventory of the estate.⁸⁷ In 1784 one statute⁸⁸ was passed making the real estate of a decedent subject to execution on judgments recovered against execu-

⁸⁵ *Durfee v. Abbott*, 50 Mich. 278 at 285, 15 N. W. 454 at 458 (1883).

⁸⁶ See Rheinstein, "European Methods for the Liquidation of the Debts of Deceased Persons," 20 IOWA L. REV. 431 at 469 (1935). See also *Durfee v. Abbott*, 50 Mich. 479, 15 N. W. 559 (1883); *Wheeler v. Hatheway*, 54 Mich. 547, 20 N. W. 579 (1884).

⁸⁷ Ancient Charters and Laws of Massachusetts Bay, published by order of the General Court (1814) 206.

⁸⁸ Mass. Acts and Laws, 1784, c. 14, p. 76, also found in Mass. Gen. Laws (1823) session of 1783, c. 32, § 7.

tors and administrators for debts of a decedent, and another statute⁸⁹ provided that a decedent's real estate should be chargeable with his debts and that an executor who is a residuary legatee might give bond to pay the debts and legacies. In the early case of *Gore v. Brazier*,⁹⁰ a residuary legatee had given such a bond, had then sold certain land owned by the decedent and was later sued for breach of the covenant of warranty in the deed. It was held by Chief Justice Parsons that such a bond was not a discharge of the creditor's lien. It was pointed out that before the provincial statute of 1 and 2 Anne, c. 5, all executors were bound to inventory and account for the testator's estate in order to furnish creditors and legatees with evidence and charge them with waste if any assets were embezzled or unaccounted for; that when legacies are specific or could be ascertained without inventory or accounting and the executor was residuary legatee, there is no occasion for an inventory or accounting if legatees and creditors can be secured. "In this case," says the court, "that statute relieves the executor from this duty, on his giving bond with sureties to the Judge of Probate for the payment of debts and legacies. . . . This lien remains in full force, and the benefit to be derived by a creditor or legatee from the bond is merely cumulative."⁹¹

But in 1819 in *Thompson v. Brown*,⁹² the Massachusetts court held that a license to an executor who was also residuary legatee and had given such a bond was not only improper but void. By giving such a bond it was said that he thereby "acquired a perfect title to the estate," and that no license to sell property of the estate was necessary because he could sell without it. This dictum that the executor thereby ac-

⁸⁹ Mass. Acts and Laws, 1784, c. 1, p. 53, also found in Mass. Gen. Laws (1823) session of 1783, c. 24, § 17.

⁹⁰ 3 Mass. 523 (1807).

⁹¹ 3 Mass. at 542.

⁹² 16 Mass. 172 (1819).

quired a perfect title to the estate became the source of confusion and error later in the same court, and accounted for a similar error in some Michigan and Wisconsin decisions later.

Similarly, in 1827 the same court declared: "The legislature has made such bond [to pay the debts and legacies] a substitute for the estate of the deceased, so that there is no longer any lien upon the real or personal estate of the testator by his creditors, after the executor shall have conveyed the same to *bona fide* purchasers."⁹³

In the revision of 1835 a provision was added to the statute⁹⁴ in Massachusetts to the effect that the giving of the bond by the residuary legatee conditioned to pay debts and legacies should not discharge the lien upon the real estate of the decedent for the payment of debts. The commissioners who had been appointed to revise the statutes stated in their report to the legislature that it was the purpose of this amendment to make the construction of the statute conform with that indicated in *Gore v. Brazier*. Later cases⁹⁵ in Massachusetts returned to the rule of that case.

A series of cases in Michigan and Wisconsin, however, took the position that the giving of such a bond actually terminated the administration and operated to pass title to the property of the estate to the residuary legatee. Thus in *Hatheway v. Weeks*,⁹⁶ the Supreme Court of Michigan said: "Having given such a bond, he is not required to make or return any inventory; he is bound to account to no one; he takes the property of the deceased and becomes at once the absolute owner thereof." And in a later case⁹⁷ it was said that the

⁹³ *Clarke v. Tufts*, 5 Pick. (22 Mass.) 337 at 340 (1827).

⁹⁴ Mass. Rev. Stat. (1835) c. 63, §§ 3, 4.

⁹⁵ *Jones v. Richardson*, 5 Metc. (46 Mass.) 247 (1842); *Collins v. Collins*, 140 Mass. 502, 5 N. E. 632 (1886).

⁹⁶ 34 Mich. 237 (1876).

⁹⁷ *Wheeler v. Hatheway*, 54 Mich. 547, 20 N. W. 579 (1884).

approval of the legatee's bond had the effect of closing the administration of the estate. A corresponding view had been announced in Wisconsin.⁹⁸ But in 1889 Michigan re-examined these cases and reached the same result⁹⁹ that Massachusetts had reached subsequent to 1835 and without any amendment of its statute relative to the effect on creditors' liens. Wisconsin did likewise.¹⁰⁰ In other states this same result has been reached,¹⁰¹ although only the Rhode Island statute contains a specific provision corresponding to the addition in the Massachusetts revision of 1836.

The net result is that what appeared for a while to amount to a true summary administration turned out to be nothing more than a statutory method for providing for an executor's bond which differs from the ordinary bond in its conditions and amount, and which furnishes an additional remedy to legatees and creditors. The legal consequences of giving such a bond are severe, with little or no advantage to the residuary beneficiary in pursuing the course authorized by such a statute. Many persons were financially ruined by giving such a bond. An examination of statutory annotations and digests reveals no case in recent years in which such a bond has been given. What might have been an importation of a civil law method has been refused admission into American law of administration.

3. *Withdrawing estates from administration*

With the development of the law of administration several methods have been devised for simplifying, for shortening,

⁹⁸ Cole's Will, 52 Wis. 591, 9 N. W. 664 (1881).

⁹⁹ Lafferty v. People's Savings Bank, 76 Mich. 35, 43 N. W. 34 (1889). See also In re Estate of Vedders, 122 Mich. 439, 81 N. W. 356 (1899).

¹⁰⁰ Pym v. Pym, 118 Wis. 662, 96 N. W. 429 (1903).

¹⁰¹ Thompson v. Pope, 77 Neb. 338, 109 N. W. 498 (1906). In general, see 2 WOERNER, ADMINISTRATION (3d ed. 1923) § 202.

or for eliminating substantially or entirely the process of administration as it is known in Anglo-American law. One such method is that of authorizing the withdrawal of an estate from administration. A Texas statute¹⁰² provides that after the return of inventory, appraisement and list of claims, any person entitled to a portion of the estate as heir, devisee or legatee may ask that the personal representative be required to render under oath an exhibit of the condition of the estate. Thereafter the persons entitled to the estate may give bond in double the appraised value of the estate conditioned to pay all unpaid debts which have been or may thereafter be allowed against the estate.¹⁰³ When such bond is approved, the exhibit passed upon and the amount due to or from the personal representative determined, the latter is required by an order of the court to make distribution to such persons of the portion of the estate to which they are entitled.¹⁰⁴ If an estate is entirely distributed to those entitled, the personal representative is discharged and the administration declared closed.¹⁰⁵ Thereafter the probate court has no jurisdiction over the estate or over the personal representative.¹⁰⁶

After the withdrawal of the estate from administration in this manner, creditors have a right to rely on the bond or to look to the distributees. The statute specifically preserves a lien on that part of the estate in the hands of each distributee and those claiming under him, with notice of such lien, to secure the payment of the claims of creditors.¹⁰⁷ If recovery

¹⁰² Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3457.

¹⁰³ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3458.

¹⁰⁴ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3459. This right in the distributees is absolute. *Pierce v. Foreign Mission Board* (Tex. Civ. App. 1920) 218 S. W. 140. But an assignee of a distributee has no such right. *Rowe v. Dyess* (Tex. Comm. App. 1919) 213 S. W. 232.

¹⁰⁵ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3465.

¹⁰⁶ *Davis v. Harwood*, 70 Tex. 71, 8 S. W. 58 (1888); *Long v. Wooters*, 18 Tex. Civ. App. 35, 45 S. W. 165 (1898).

¹⁰⁷ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3461.

is sought against a distributee, any judgment obtained must not exceed the value of the estate distributed to him.¹⁰⁸ On the other hand, if recovery is sought on the bond, recovery is limited only by the amount of the bond and the basis of the cause of action is entirely independent of the value of the estate distributed.¹⁰⁹

The result achieved by this procedure is in some respects similar to that already achieved by summary administration of small estates which are entirely consumed in the setting off of exempt property or in the satisfying of a minimum of family allowance. In the latter case, however, there is a completion of the functions of administration, while under the Texas statute authorizing the withdrawal of estates from administration there is admittedly no such completion. In lieu of such completion there is the substitution of a bond as a kind of res to insure the accomplishment of the functions of administration.

4. *Nonintervention wills*

Another method that has been developed for dispensing with administration of estates is that of the independent executor under a nonintervention will. Whether administration in connection with the decedent's estate is a required proceeding, or whether it may be dispensed with in whole or in part, is a matter involving several considerations of policy. Unless a statute specifically authorizes it, a testator, for example, cannot direct that no administration be had on his estate. Solicitude for creditors has led most states to regard administration as the normal process to be followed. A testamentary provision that administration on the testator's estate shall be independent of judicial control is entirely

¹⁰⁸ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3464.

¹⁰⁹ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3462, 3463. See also *Thomas v. Bonnie Bros.*, 66 Tex. 635, 2 S. W. 724 (1886).

ineffective in most states.¹¹⁰ Doubtless influenced by the procedure of the civil law, legislation has been adopted in four states authorizing their probate courts to give effect to an expressed wish of this kind. The purpose of such statutes, it is said, is to provide for the settlement of estates with a minimum of judicial supervision and expense.¹¹¹ The size of the estate has no bearing upon the propriety of resorting to this procedure.

Statutes recognizing the validity of nonintervention wills and independent executors have been passed in Arizona,¹¹² Idaho,¹¹³ Texas¹¹⁴ and Washington.¹¹⁵ These statutes are of two general patterns, one adopted by Texas and the other by Washington. The Arizona statute is modeled after the Texas statute and the Idaho statute after the Washington statute. Neither the Arizona nor Idaho statutes are used extensively. In fact, no reported appellate cases appear to have been decided in either of these states. But numerous cases have arisen both in Texas and in Washington where the power to name an independent executor is exercised frequently. A Texas statute provides that "Any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and lists of claims of his estate."¹¹⁶ The Washington statute¹¹⁷ is similar but requires a preliminary finding by the court that the estate is fully solvent, which fact may be established on

¹¹⁰ *Sevier v. Woodson*, 205 Mo. 202, 104 S. W. 1 (1907).

¹¹¹ *Wilhelm's Estate v. Matthews* (Tex. Civ. App. 1925) 274 S. W. 251; *Schubach v. Redelsheimer*, 92 Wash. 124, 158 P. 739 (1916).

¹¹² *Ariz. Code* (1939) § 38-1902.

¹¹³ *Idaho-Laws Ann.* (1943) §§ 15-237 and 15-238.

¹¹⁴ *Tex. Civ. Stat. Ann.* (Vernon, 1939) art. 3436-3447 inc.

¹¹⁵ *Wash. Rev. Stat.* (1932) §§ 1462 and 1463.

¹¹⁶ *Tex. Civ. Stat. Ann.* (Vernon, 1939) art. 3436.

¹¹⁷ *Wash. Rev. Stat.* (1932) § 1462.

the filing of the inventory. But in Texas, insolvency of the estate will not prevent an independent administration thereof.¹¹⁸ Where estates are so administered pursuant to the express wishes of the testator, the personal representative, following the probate of the will, need only file an inventory. Thereafter he may administer and settle the estate without the intervention of the court.¹¹⁹ No letters testamentary or of administration are granted. Notice to creditors is required under the Washington statute but not under the Texas statute.¹²⁰ Both statutes contemplate that the powers and duties of such an independent executor shall be as full and complete as is possessed by the personal representative acting under judicial supervision. The Idaho and Washington statutes¹²¹ expressly provide that such an independent executor may mortgage, lease, sell and convey the real and personal property of the estate without an order of court in the first instance and without any approval or confirmation thereafter, and in all other respects administer and settle the estate without the intervention of the court. Similar powers are implied under the Texas statute.¹²² In Washington, so long as the executor faithfully performs his duties in the management of the estate, the court is prohibited from taking any control over the executor or the estate.¹²³

Under the Texas system the creditor is not obliged to present his claim to the executor or to the court for allowance

¹¹⁸ *Shackleford's Admx. v. Gates*, 35 Tex. 781 (1872).

¹¹⁹ *Ewing v. Schultz* (Tex. Civ. App. 1920) 220 S. W. 625; *Cocke v. Smith* (Tex. 1944), 179 S. W. (2d) 954; *Schubach v. Redelsheimer*, 92 Wash. 124, 158 P. 739 (1916).

¹²⁰ Wash. Rev. Stat. (1932) § 1462. In Texas, no statute specifically so provides, but the cases imply this.

¹²¹ Idaho Laws Ann. (1943) § 15-238; Wash. Rev. Stat. (1932) § 1463.

¹²² *Ellis v. Howard Smith Co.*, 35 Tex. Civ. App. 566, 80 S. W. 633 (1904); *Cockrell v. Lovejoy* (Tex. Civ. App. 1931), 44 S. W. (2d) 1040; *Martin v. Dial* (Tex. Comm. App. 1933), 57 S. W. (2d) 75.

¹²³ *State ex rel. Johnson v. Superior Court*, 131 Wash. 264, 230 P. 434 (1924).

or classification, but may demand payment of the executor and may sue thereon.¹²⁴ If a judgment is obtained against the executor, execution may be had against the decedent's estate unless it be insolvent.¹²⁵ In Washington, however, claims must be presented to the executor in the same manner as in estates regularly administered. *

Under the Texas statute,¹²⁶ the court may accept the resignation of the executor when tendered. Upon the removal, resignation or death of the executor, the court has power to appoint a successor to the office. A series of statutes in Texas¹²⁷ is designed to confer upon such successor all the powers originally given to the executor named in the will, including the power to act independently of any control by the court.

Certain disagreements between the executor on the one hand and the heir or creditor on the other hand may be the basis for the executor's resorting to the court for a determination thereof. Thus, the executor may ask the court to fix the attorneys' fees.¹²⁸ But the attorney has not been allowed a similar privilege, it being said that he has an adequate remedy by a separate action.¹²⁹ A petition by the executor for advice and instructions from the court has also been entertained.¹³⁰

In one sense, this is not a dispensing with administration but is a true administration independent of the probate court. Such an executor is called an independent executor and the management of the estate by him, even though independent

¹²⁴ *Bell's Estate v. Farmers' & Merchants' Nat. Bank*, 33 Tex. Civ. App. 408, 76 S. W. 798 (1903); *Ewing v. Schultz* (Tex. Civ. App. 1920), 220 S. W. 625.

¹²⁵ *Bell's Estate v. Farmers' & Merchants' Nat. Bank*, 33 Tex. Civ. App. 408, 76 S. W. 798 (1903).

¹²⁶ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3470.

¹²⁷ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3456A to 3456I inc.

¹²⁸ *Estate of Perry*, 168 Wash. 428, 12 P. (2d) 595 (1932).

¹²⁹ *Estate of Megrath*, 142 Wash. 324, 253 P. 455 (1926).

¹³⁰ *Estate of Megrath*, 142 Wash. 324, 253 P. 455 (1926).

of the court, is nevertheless considered an administration.¹³¹ The power of the court over the administration does not cease absolutely, however. A potential jurisdiction remains in the court in certain emergencies. Under the Washington statute,¹³² if it appears that the executor is about to commit a breach of trust or has committed some breach, the court may order his removal. Under the Texas statutes,¹³³ if either creditors or other persons interested in the estate show that the executor is wasting, mismanaging or misapplying property of the estate and that they will be affected thereby, the court may require the executor to give bond for the faithful administration of the estate. Only if the executor fails to give such bond may the court remove him.¹³⁴ Judicial control may thus be invoked instantly in Washington for acts of mismanagement, but in Texas it is invoked only by ordering the executor to give bond and then by removing him for failure to comply with such an order. The directness of the Washington procedure has much to commend it. The Texas statute, on the other hand, preserves more nearly the independent administration authorized by the testator. Under both statutes, the testator may dispense with the requirement of a bond by the executor.¹³⁵

It will be noted that, except for special reasons and for limited purposes, the administration is expected to continue independent of any judicial control. Unless the power of the court over the estate and its administration is invoked in some appropriate manner, the administration is carried out to a conclusion-including distribution without the advice or supervision of the court in any degree. Under the Washing-

¹³¹ Roy v. Whitaker, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367 (1898); Swearingen v. Williams, 28 Tex. Civ. App. 559, 67 S. W. 1061 (1902).

¹³² Wash. Rev. Stat. (1932) § 1462.

¹³³ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3439.

¹³⁴ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3441.

¹³⁵ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3438-3440; Wash. Rev. Stat. (1932) § 1439.

ton statute,¹³⁶ a court, upon application to it, has the authority to enter a decree finding and adjudging that all debts have been paid and designating the heirs and persons entitled to distribution of the estate. A Texas statute¹³⁷ provides that an independent executor may ask the court to partition or distribute an estate where the will does not dispose of all of it or fails to provide a means for its partition. In these particular instances also, the power of the court may be invoked; but in other respects the administration by the executor under a non-intervention will is truly independent.

5. *Other legislation in aid of summary administration*

Ever since the California Probate Act of 1851 was passed, legislation in the Western states has exhibited a growing tendency to simplify, to shorten and to minimize expenses of administration proceedings. A provision for summary administration in the California Act of 1851¹³⁸ as amended by the Code of 1871,¹³⁹ provided that if upon the return of the inventory it appeared that the value of the whole estate does not exceed the sum of \$3,000 "it is in the discretion of the Probate Court to dispense with the regular proceedings, or any part thereof, prescribed in this Title, and there must be had a summary administration of the estate, and an order of distribution thereof at the end of six months after the issuing of letters; the notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases." The shortened period of administration, the reduction of the nonclaim period and the simplified procedure were courageous departures from established procedures and rep-

¹³⁶ Wash. Rev. Stat. (1932) § 1462.

¹³⁷ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3442.

¹³⁸ Cal. Laws, 1851, p. 464, § 126.

¹³⁹ 2 Cal. Code Civ. Proc. (1872) p. 204, § 1469.

resented appropriate objectives for the administration of small estates. Since that time the nonclaim period in California has been reduced to six months in all estates, and final distribution is possible at any time thereafter. Nevertheless the basic purposes of that early statute have not been without influence elsewhere.

Statutes in Montana and Oklahoma¹⁴⁰ similarly provide that the court may in its discretion dispense with regular proceedings, order a summary administration in small estates, require that creditors present their claims within four months and permit distribution after six months. A group of Louisiana statutes¹⁴¹ also provide for the summary settlement of small successions, or of those so heavily indebted that no one will accept their administration. This they accomplish by authorizing the clerk of the district court to sell the effects of the estate and apply the proceeds to the payment of debts, the whole to be done in as summary a manner as possible. The avowed purpose of these statutes is to provide for the speedy and economical settlement of estates.¹⁴²

Another device for simplifying the problems of the personal representative in small estates is that of dispensing with the usual requirements of notices¹⁴³ in connection with the various steps of an administration, or of permitting the posting of notices instead of requiring the relatively expensive method of publication.¹⁴⁴ Usually, of course, when the en-

¹⁴⁰ Mont. Rev. Code (1935) § 10149; Okla. Stat. (1941) t. 58, § 317.

¹⁴¹ La. Civ. Code (Dart, 1945) art. 1190; La. Gen. Stat. (Dart, 1939) §§ 9707-9715.

¹⁴² Hoffman's Heirs v. Hunter, 127 La. 673, 53 So. 903 (1910); Rizzotto v. Grima, 164 La. 1, 113 So. 658 (1927).

¹⁴³ Mich. Stat. Ann. (Supp. 1945) § 27.3178(449) (of grant of letters), § 27.3178(450) (after distribution to widow, widower or minor children); Mo. Rev. Stat. Ann. (1942) § 249 (of all further advertisements after distribution to surviving spouse or minor children); Mont. Rev. Code (1935) § 10170 (notice to creditors); Utah Code (1943) § 102-9-1 (notice to creditors); Wash. Rev. Stat. (1932) § 1477 (notice to creditors).

¹⁴⁴ Del. Rev. Code (1935) § 3861 (amended Laws 1939, c. 142); Fla. Stat. Ann. (Supp. 1945) § 735.03; Nev. Comp. Laws (Supp. 1941) § 9882.308; Miss. Code (1942) § 567; S. C. Code (1942) § 212.

· tire estate is not more than sufficient to satisfy the requirements of homestead, exemptions and family allowance, creditors would have no interest in being advised as to proceedings taken by the personal representative. But the primary purpose of minimizing expenses and providing a speedy settlement for the surviving family of a decedent is evident in most of these pieces of legislation.

In three states¹⁴⁵ provision is made for simplifying the settlement of small or insolvent estates by dispensing with the appointment of a commissioner of accounts or similar officer where such a procedure is ordinarily followed.

The summary administration and settlement of small estates by public administrators or other officials having an equivalent function is also provided for in several codes.¹⁴⁶

A Connecticut statute¹⁴⁷ enacted in 1945 provides that when any person who has received old age assistance dies leaving personal estate not exceeding \$500 in value and no administration is granted within ninety days after death, the commissioner of welfare may take possession of such estate and dispose of it according to certain statutory provisions.

A statute¹⁴⁸ in South Dakota gives the county court power to combine two or more estates in one probate proceeding when the beneficiaries are the same in each estate, thus avoiding the duplication of procedure that would otherwise result. The consolidation of estates for the purpose of administration is possible when two members of the same family, such as husband and wife or brothers and sisters, die at the same

¹⁴⁵ N. H. Rev. Stat. (1942) c. 356, § 34; Vt. Pub. Laws (1933) § 2832; W. Va. Code (1943) § 4147.

¹⁴⁶ See, for example, Cal. Prob. Code Ann. (Deering, Supp. 1945) § 1144; Mass. Ann. Laws (1932) c. 194, §§ 17, 18; Minn. Stat. (1941) § 525.393; Mont. Rev. Code (1935) §§ 10012, 10013; N. Y. Dec. Est. Law, § 103-b; Wyo. Rev. Stat. (1931) § 88-917. The treatment of these statutes under which public administrators function is not within the scope of this study.

¹⁴⁷ Conn. Laws, 1945, Pub. Act 312.

¹⁴⁸ S. D. Code (1939) § 32.0909(10). Cf. Idaho Laws Ann. (1943) § 15-376, limited to community property ownership, and discussed in subdivision III-C-4, *infra*.

time or approximately the same time leaving identical heirs or beneficiaries under their wills.

C. JUDICIAL SETTLEMENT WITHOUT APPOINTMENT
OF PERSONAL REPRESENTATIVE

1. *Another method for small estates*

In the preceding discussion treating of the summary settlement of small estates after the return of the inventory, it was pointed out that such an administration proceeding, while somewhat shorter than usual, was nevertheless complete. Early distribution to the family was shown to be possible because of the smallness of the estate and its complete consumption in being set off as homestead and exempt property for the use of the decedent's family. The determination of distributive rights was seen to be entirely independent for the most part of the existence of creditors and other distributees. The time ordinarily consumed and the effort involved in the determination of the claims of the latter are eliminated by such a procedure. In short, the task of the personal representative is relatively so simple that the usual period allowed for the administration of an estate is unnecessary. But judicial control over the administration proceeding is full and continuous while it lasts.

If these results are obtainable for small estates in comparatively short periods of time, it may well be inquired why they may not even be accomplished in one step or by one order of the probate court. In appropriate cases similar procedure could well be made available by one order or decree of the court, and without interposing a personal representative, without supervising his activities for a limited time, without ordering a distribution of the property, and without passing upon an accounting and finally discharging him. Indeed, legislation authorizing summary settlements of this more

abbreviated character has been slowly developing over a period of three quarters of a century. Its merits may be observed in states where it has been in operation and has been subjected to the test of time and experience.

The first legislation of this kind was adopted in Missouri in 1877¹⁴⁹ at the suggestion and sponsorship of Judge J. G. Woerner, judge of the probate court of the city of St. Louis,¹⁵⁰ and author of the well known work on *American Law of Administration*. Under this statute, if the estate of the decedent is less than that allowed by law as the absolute property of the widower, widow or minor children, the court may officially determine that administration is unnecessary and order that no letters of administration be issued. Under such an order the property of the estate is set off to the widower, widow or minor children who are entitled to collect, and to sue for and retain all property belonging to the estate in the same manner as a personal representative would if functioning in an official capacity. The existence of debts against the estate is immaterial, since the surviving spouse or minor children are entitled to the entire estate absolutely and irrespective of claims against it. In a suit to collect assets no proof as to the non-existence of creditors' claims is necessary, since the order of the court that no letters be issued confers this right upon them independent of the existence of creditors. Such statutes, however, are necessarily confined in their operation to small estates. Nevertheless they offer another inexpensive and expeditious procedure for simplifying the problem of the surviving spouse and minor children in such cases.

In addition to Missouri, where such legislation had its origin, similar statutes are now found in Arizona, California,

¹⁴⁹ Mo. Laws, 1877, p. 4. This statute has been amended by subsequent legislatures, the last amendment being in 1941. For the present wording of the statute see Mo. Rev. Stat. Ann. (1942) § 2.

¹⁵⁰ See 2 WOERNER, ADMINISTRATION (3d ed. 1923) 669, note.

Colorado, Florida, Idaho, Indiana, Kentucky, Maryland, Michigan, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Vermont and Virginia. Many of them have been modeled after the Missouri statute. All of them represent attempts to provide a direct and highly desirable method for the collection and distribution of small estates, thus enabling the family of the decedent to have the estate immediately for their support. Distribution is immediate and direct from the decedent to the heirs. The slight amount of judicial contact and judicial control over the estate under all these statutes is to be contrasted with that under the summary procedure of the statutes previously discussed wherein a personal representative was appointed.

The Missouri statute ¹⁵¹ was amended somewhat in 1917. It now provides for an immediate setting off or distribution of the estate when the estate is not greater in amount than is allowed as the absolute property of the widow, widower or minor children under eighteen years of age, or at the instance of a creditor when the estate does not exceed \$100 and there is no widow, widower or minor children under eighteen years of age, and the creditor gives a bond conditioned upon the creditor paying the debts of the decedent in the order of their preference so far as the assets of the estate will permit. The order of the court not only operates to dispense with an official administration but also authorizes and empowers the widower, widow, minor children or creditor, as the case may be, to collect and sue for all the property belonging to the estate in the same manner and with the same effect as a personal representative. This statute was among the first to provide that in this particular instance the title of the decedent's property could pass directly to the heirs, distributees or other persons entitled thereto without the interposition of

¹⁵¹ Mo. Rev. Stat. Ann. (1942) § 2.

a personal representative.¹⁵² At the same time it answered a definite need in small estates by affording adequate protection to debtors of the estate who ordinarily would be entitled to insist on making payment only to a duly appointed personal representative.¹⁵³ The procedure is quite informal. Ordinarily the surviving spouse presents a verified petition to the probate court, setting forth the necessary facts prescribed in the statute together with an itemized list of the property left by the decedent and the value of each piece. Upon proof the court thereupon makes an order granting the petition, determines that no administration is necessary and orders that no letters be issued, and that the widower, widow, minor children or creditor shall have full authority to collect and sue for all property belonging to the estate.

A statute of Arizona¹⁵⁴ provides for the summary settlement and distribution of any estate where the value does not exceed \$300. Any person desiring to settle such an estate may make and file an affidavit in the superior court setting forth the death of the decedent and stating that the estate does not exceed \$300 in value. Unlike the Missouri provi-

¹⁵² Statutes in California, North Dakota, Oklahoma, South Dakota, Texas, Utah and Washington provide that the title to a decedent's property shall pass directly to the heirs, legatees or persons entitled to succeed to the estate by intestacy but that such property shall be subject to the possession of the executor or administrator and to the control of the court for the purposes of administration, sale or other disposition under the law, and shall be chargeable with the expenses of administration, debts and family allowance. However, the totality of rights and powers possessed by a personal representative under such statutes as these is the substantial equivalent of ownership by him.

¹⁵³ *Parsons v. Harvey*, 281 Mo. 413 at 427, 221 S. W. 21 (1920). In this case it was said: "It is manifest that Section 34 of Article 6 of our Constitution confers upon probate courts complete jurisdiction over all matters pertaining to probate business. There is nothing in our Constitution which forbids the General Assembly from passing practical and common sense statutes, like Section 10, *supra*, which facilitate the transaction and convenience of public business, at a minimum expense, and that, too, without doing an injury to creditors and other persons, whose rights may still be asserted before the court. . . . These statutes are enacted because of their public convenience. They simplify the business before such courts, at a minimum cost, and without injury to anyone."

¹⁵⁴ Ariz. Code (1939) § 38-1901.

sion, the survival of particular members of the decedent's family, or the existence of a creditor, is unnecessary in order to invoke the statute. The superior court is authorized to prescribe rules and regulations for the procedure to be followed in such cases. The statute requires the filing of an accounting of all property received and disbursed. No fee is permitted to be charged or collected on account of the summary settlement of such small estates.

In California a statute¹⁵⁵ was enacted in 1929 providing that if a decedent leaves a surviving spouse or minor child or children, and the net value of the whole estate over and above all liens or encumbrances does not exceed \$2,500, the person petitioning for probate of the will or for letters of administration may add an allegation to this effect in his or her petition therefor, together with a specific description of all of the decedent's property, the liens and encumbrances thereon and an estimate of its value, and may pray, as an alternative, if the court finds the net value of the estate not to exceed \$2,500, for the assignment of the property to the surviving spouse or minor children as the case may be. Such a petition must be verified and the notice thereof must appropriately refer to the prayer for summary distribution. Another section¹⁵⁶ provides that if the original petition for probate of the will or for letters of administration does not contain such an allegation, a separate or supplementary petition therefor may be filed at any time prior to the hearing on such petition, but at least ten days' notice thereon must be given and the hearing on the original petition continued if necessary. If, upon the hearing on the petition, it appears that the value of all property of the estate does not exceed \$2,500, the decree or order rendered thereon vests title to all

¹⁵⁵ Cal. Prob. Code Ann. (Deering, 1944) § 640.

¹⁵⁶ Cal. Prob. Code Ann. (Deering, 1944) § 641.

property of the estate, subject, of course, to any mortgages, liens or encumbrances, in the surviving spouse, if any, and otherwise, in the minor child or children of the decedent.¹⁵⁷

No further proceedings are to be taken in the estate unless additional estate be discovered. By a provision in this statute passed in 1929 any surviving spouse or minor child having other estate of \$5,000 in value is excluded from the benefits of the statute. Another section¹⁵⁸ provides that if upon the hearing the court determines that the net value of the estate exceeds \$2,500, or that the surviving spouse or minor child has other estate of \$5,000 in value, or that there is neither a surviving spouse nor minor child, it shall act upon the petition for probate or for letters of administration and cause the estate to be administered upon in the usual manner.

A Colorado statute¹⁵⁹ prescribes a similar procedure in estates of the value of \$300 or less. Upon a verified application the court may authorize the payment, transfer or delivery of the estate to the surviving spouse, other heirs or to the creditors of the decedent in the discretion of the court. Like the Arizona statute, the survival of any particular members of the family is not necessary to its application. The statutory fee for such estates is limited to five dollars.

Extensive provisions rendering administration unnecessary in estates less than \$2,000 in value are contained in recent amendments to the new Florida Probate Code,¹⁶⁰ which represents a distinct departure from the widely held theory that the heirs can obtain title only through a personal representative. Several situations are said to justify dispensing with administration. The statute¹⁶¹ provides that

¹⁵⁷ Cal. Prob. Code Ann. (Deering, 1944) § 645.

¹⁵⁸ Cal. Prob. Code Ann. (Deering, 1944) § 646.

¹⁵⁹ Colo. Stat. (1935) c. 176, § 77.

¹⁶⁰ Fla. Stat. Ann. (Supp. 1945) §§ 735.01 to 735.13.

¹⁶¹ Fla. Stat. Ann. (Supp. 1945) § 735.04.

"The county judge may dispense with administration upon the estate of any testate or intestate who died a resident of this state:

"(1) When the entire estate is exempt from the claims of creditors under the constitution and statutes of the State of Florida; or

"(2) When the estate is not indebted and does not, in the judgment of the county judge, exceed in the aggregate two thousand dollars in value, exclusive of property exempt under the constitution and statutes of the State of Florida, and there is a sole heir or surviving spouse, or the surviving spouse and all the heirs of such an estate agree upon the distribution of the estate, or the decedent died testate leaving an estate, and the legatees and devisees, and the widow, if any, agree upon the distribution of the estate after the probate of the will of the deceased."

A verified petition is required to be filed in the county judge's court by the surviving spouse and all the heirs, or by the guardians of any heirs who are not sui juris, setting forth their respective relationships to the decedent, a schedule of all of the decedent's property and its value, a statement of the agreed distribution of it among the petitioners, and, if it is claimed to be exempt, the names of all creditors.¹⁶² When a decedent has died leaving a will, such a petition may be filed only after the will has been probated. If the entire estate is claimed to be exempt, all known creditors must be notified. If the judge finds the facts contained in the petition to be true, he shall make a finding of the true cash value of the estate and order that administration is unnecessary, and, as a part of the order, make findings as to the heirs or devisees entitled to distribution of the estate, what property shall be distributed to each and, if the entire estate is exempt, of what the estate consists and what debts are known to exist against the estate.¹⁶³ It is always within the discretion of the judge

¹⁶² Fla. Stat. Ann. (Supp. 1945) § 735.05.

¹⁶³ Fla. Stat. Ann. (Supp. 1945) §§ 735.06, 735.07.

to deny the petition if he is in doubt as to the truth of any of the facts alleged in the petition,¹⁶⁴ in which case administration may be had in the usual manner. If the petition is granted, the distributees are then entitled to receive and collect the respective parts assigned to them, to have the same transferred to them and to maintain suits therefor; but they thereby become jointly and severally liable to creditors to the extent of the estate received by them, exclusive of exempt property.¹⁶⁵ This liability to creditors persists for three years,¹⁶⁶ which is the same period creditors are allowed to enforce their claims in the absence of administration.¹⁶⁷ However, the distributees may publish a notice to creditors notifying them of the entering of the order and of the distribution of the estate without formal administration and thereby reduce to eight months the time for creditors to present their claims.¹⁶⁸ Any heir or devisee under a will already admitted to probate, or a devisee under a will subsequently discovered, may likewise enforce his rights, in the same manner as creditors, against those who procured the order dispensing with administration and received the property of the decedent.¹⁶⁹ The entire cost of a proceeding dispensing with administration is seven dollars and fifty cents and an additional fifty cents for each notice given by registered mail.¹⁷⁰

A recent Idaho statute¹⁷¹ authorizes the probate court, upon verified petition, to set aside and assign bank accounts of a total not exceeding \$300 to the surviving widow of a decedent where no administrator has been appointed. Such deposits up to that amount are declared to be exempt from

¹⁶⁴ Fla. Stat. Ann. (Supp. 1945) § 735.08.

¹⁶⁵ Fla. Stat. Ann. (Supp. 1945) § 735.09.

¹⁶⁶ Fla. Stat. Ann. (Supp. 1945) § 735.09.

¹⁶⁷ Fla. Stat. Ann. (1941) § 734.29.

¹⁶⁸ Fla. Stat. Ann. (Supp. 1945) § 735.10.

¹⁶⁹ Fla. Stat. Ann. (Supp. 1945) §§ 735.11, 735.12.

¹⁷⁰ Fla. Stat. Ann. (Supp. 1945) § 735.13.

¹⁷¹ Idaho Laws Ann. (1943) § 15-1406.

probate, administration, claims of creditors and heirs, and from inheritance taxes. This statute, however, does not appear to be confined to small estates, although it doubtless is so confined in its practical operation. It would appear to authorize such a procedure in any estate, however large, but to limit payments therefor to \$300 or less to the widow.

An Indiana statute¹⁷² authorizes the circuit court in cases where a decedent has left an estate not worth over \$500 and is survived by a widow to vest the entire estate in the widow absolutely. Upon filing a petition therefor the clerk is directed to appoint a disinterested householder to make an inventory and appraisal of the estate, both real and personal, which must be verified by the widow as to its completeness. Upon the return of the inventory the clerk is directed not to issue letters but to continue further proceedings until the next term of the court thereafter when the court shall, if no opposition be made, enter a decree vesting in the widow all the title and interest of the decedent in such estate at his death and directing that no letters issue thereon. Notice thereof must be given by the widow by publishing or posting. Creditors may contest the petition at the time set for its hearing upon the ground that the inventory does not contain all property belonging to the estate or that the estate was improperly valued, and that in either case the total value of the estate exceeds \$500. In this event, the court must appoint two other disinterested householders who will proceed to re-appraise the property. The final action of the court is made upon this second inventory and appraisal. The order of the court vesting the title to the estate in the widow is declared to be sufficient authority to enable her to sue for and recover debts and property belonging to the estate. She is exempted from liability for any of the decedent's debts, except real estate mortgages, but she is made liable for his

¹⁷² Ind. Stat. (Burns, 1933) §§ 6-1701 to 6-1704.

reasonable funeral expenses and the expenses of his last sickness.

Under the Kentucky statutes ¹⁷³ the county court has jurisdiction to dispense with administration of small estates if the personal property on hand or in bank does not exceed the amount to which the widow or surviving minor children are entitled to have set aside to them as exempt. After such an order is made the widow or minor children (through their guardian) may sue for and obtain all property belonging to the estate, and shall thereafter settle accounts in the same manner as a personal representative.

A recent Maryland statute ¹⁷⁴ provides that if a decedent dies intestate and leaves a small estate consisting solely of personal property, the person entitled to be appointed administrator may file a petition in the Orphans' Court requesting that administration be dispensed with. The court may make a preliminary order declaring that no formal administration is necessary and instructing the petitioner to publish notice to creditors to exhibit their claims within thirty days. Upon the expiration of the thirty-day period the court may then render a final order relieving the estate of formal administration and directing distribution of the estate.

The Michigan Probate Code ¹⁷⁵ provides that if the estate of a decedent consists solely of a pay check or other personal property less than \$200, the probate judge may order such property turned over to the widow or widower, or, if there be no surviving spouse, upon the showing of evidence that funeral expenses have been paid, to the nearest of kin or the person who shall have paid such expenses. This kind of order may be made without the appointment of an administrator or the giving of a **bond**.

¹⁷³ Ky. Rev. Stat. (1944) §§ 395.450, 395.460.

¹⁷⁴ Md. Code (Supp. 1945) art. 93, § 151A, as added by Md. Laws, 1945, c. 458.

¹⁷⁵ Mich. Stat. Ann. (Supp. 1945) § 27.3178(451).

Nebraska¹⁷⁶ provides for the summary settlement of small estates by authorizing the filing of a petition showing the usual facts as to the death of a decedent, the names of his heirs and an allegation that his estate is wholly exempt from attachment, execution or other process and is not liable for the payment of decedent's debts. After published notice of the time set for the hearing on such a petition and a finding that the facts alleged in the petition are true, the court is directed to make an order dispensing with regular administration and distributing the estate directly to the heirs or devisees. These statutes are called the "Small Estates Act."

Nevada¹⁷⁷ classifies estates into two groups for the purpose of dispensing with administration. If the decedent leaves a surviving spouse or a minor child or children and his estate does not exceed \$1,000 in value, the statute directs that his estate shall not be administered upon but that it shall be assigned and set apart for the support of the spouse or minor children. Even though there be a surviving spouse the court may in its discretion set aside the whole estate for the benefit of the minor children, after directing such payments as may be deemed just. This may be compared with the provisions of the California, Arizona and Utah statutes¹⁷⁸ which exclude from the benefits of participation in small estates a surviving spouse who has separate estate of her own. But if the decedent leaves neither a spouse nor minor children, administration may be dispensed with only when the estate does not exceed \$400 in value. But even here the court may direct the payment of funeral expenses, the expenses of the decedent's last illness and other claims. All proceedings taken under this statute are initiated by a verified petition, containing a list of all property belonging to the estate together with its

¹⁷⁶ Neb. Rev. Stat. (1943) §§ 30-334 to 30-338.

¹⁷⁷ Nev. Comp. Laws (Supp. 1941) § 9882.117.

¹⁷⁸ See notes 72, 73 and 74, *supra*.

estimated value and a statement of all debts of the decedent so far as known. Notice is given by posting upon the bulletin board of the county courthouse. The costs of publishing notice are limited to \$5.00 and court costs to \$15.00.

In New Jersey,¹⁷⁹ when the total value of the real and personal property of an intestate estate does not exceed \$100 and there is no surviving spouse, a statute permits one of the next of kin, with the written consent of the remaining next of kin, to petition the surrogate for permission to collect the personal assets for the benefit of all the next of kin. No formal administration is required and no bond need be given. Such petitioning next of kin has the same rights, powers and duties as does an administrator and may be sued and required to account. A related statute¹⁸⁰ authorizes the payment or delivery of debts or property not exceeding \$100 to the next of kin upon receipt of a copy of the affidavit furnished to the surrogate marked a true copy by the surrogate, and that such person so paying or delivering shall be forever discharged from all claims by any administrator who may be appointed or by any other person, notwithstanding that it may thereafter occur that the intestate had left an estate exceeding \$100, or a surviving spouse or next of kin not consenting, or that the allegations of the affidavit are erroneous. Because of the limitation of amount and the restriction that there must be no spouse surviving, it would seem that these statutes have but little practical value.

Under the North Carolina statutes¹⁸¹ debts not exceeding \$300 owing to a decedent may be paid into the hands of the clerk of the court whose receipt is declared to be a full and complete release and discharge for such debts. The clerk is then authorized and empowered to pay out such collected

¹⁷⁹ N. J. Stat. Ann. (Supp. 1945) § 3:7-8.1.

¹⁸⁰ N. J. Stat. Ann. (Supp. 1945) § 3:7-8.2.

¹⁸¹ N. C. Gen. Stat. (1943) § 28-68.

sums first, for the family allowance, second, for funeral expenses, and any other surplus as the law provides. This statute applies only to certain counties and does not include the entire state. The primary purpose is to provide a method by which a debtor of the decedent may discharge his debt by paying the amount to the clerk of the superior court. However, the statute is permissive only and is not mandatory upon the debtor.¹⁸² In small estates where all parties are in agreement such a procedure is valuable for providing a means of settlement without formal administration. Its permissive character would seem to be a serious drawback to a full realization of its possibilities.

A similar statute in South Carolina¹⁸³ provides that when a person dies intestate and leaves personal property only, of the value of \$500 or less, it shall be the duty of the probate judge to receive such estate, pay funeral expenses and expenses of last illness and to distribute the residue, if any, to the distributees without the requirement of administration. Any person, firm or corporation having money or other property belonging to the estate of the decedent is required to turn the same upon demand over to the probate judge whose receipt shall be a discharge of such liability. In *Mitchell v. Dreher*,¹⁸⁴ the Supreme Court of South Carolina expressed an opinion that this section was probably intended to apply only to those estates in which creditors were not concerned, but involved "simply the distribution of untrammelled assets." If this be true a small estate which is indebted could not be thus set off to the heirs by summary procedure.

A much broader and more inclusive Virginia statute¹⁸⁵ authorizes the payment of money up to \$500 into the court of the county in which such fund accrued or arose, whereupon

¹⁸² *In re Franks' Estate*, 220 N. C. 176, 16 S. E. (2d) 831 (1941).

¹⁸³ S. C. Code (1942) § 9028.

¹⁸⁴ 150 S. C. 125, 147 S. E. 646 (1929).

¹⁸⁵ Va. Code (1942) § 6143(a).

the court may authorize its expenditure or use for the benefit of the person entitled to it without the intervention of a personal representative. No reported cases have arisen under this statute. It is not a part of the probate statutes of Virginia and it may be somewhat doubtful how effective it is for the purpose of dispensing with administration.

In one sense these statutes of North Carolina, South Carolina and Virginia provide for a summary administration through a personal representative, the clerk or judge acting as a kind of substitute for the personal representative in this case. In actuality, however, no personal representative is appointed and the distribution is made in as summary and as direct a manner as possible, the purpose being to conserve time, expense and unnecessary procedure in small estates.

An Ohio statute¹⁸⁶ authorizes the court to order an estate relieved from administration when the value of the assets of the estate is less than \$500 and creditors will not be prejudiced thereby. A petition is filed praying for such an order, setting forth the distributees, the character and value of the property comprising the estate and a list of all known creditors. If the court orders the estate relieved from administration, it also orders the property delivered and transferred to the persons entitled thereto. For this purpose the court fixes the amount of property to be delivered or transferred to the surviving spouse or minor children of the decedent, in lieu of property not deemed assets, and of an allowance for a year's support. A commissioner may be appointed to execute instruments of conveyances when necessary. Such an order relieving an estate from administration has the same effect as administration proceedings in freeing land in the hands of an innocent purchaser for value from the possible claims of unsecured creditors. A comment¹⁸⁷ on this section by the

¹⁸⁶ Ohio Gen. Code (Page, 1937) § 10509-5.

¹⁸⁷ See comment in annotations to this section.

Committee on Probate and Trust Law of the Ohio State Bar Association at the time of the adoption of the new Ohio Probate Code in 1933 indicates that the purpose of this summary procedure was to relieve small estates from the expenses of administration.

A Pennsylvania statute¹⁸⁸ authorizes the Orphans' Court to distribute estates not exceeding \$200 in value without granting formal letters of administration. Nevertheless, an accounting must be filed and audited. Distribution may be made under such rule of court as may be established by general order or by special order made in each estate.

Another Pennsylvania statute¹⁸⁹ provides that when any decedent shall leave a widow or children surviving him and an estate not exceeding \$500 in value, such widow or children may petition the Orphans' Court to set aside such property to them as exempt. The court may act upon the petition and set aside such property without notice or appraisal and irrespective of whether letters have been issued or a will probated. The purpose of this statute, it has been said, is to avoid the cost of administration on small estates where the entire property would be consumed in being set off as exempt property, if administration were to be granted.¹⁹⁰

The South Dakota Code¹⁹¹ contains extensive provisions for the summary administration of small estates or estates of such a size and character that creditors are not likely to share in them. It provides that summary administration may be had (1) when the gross estate of the decedent, including both real and personal property, does not exceed \$1,500, or (2) when the gross value of the estate, exclusive of homestead

¹⁸⁸ Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 343.

¹⁸⁹ Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 477.

¹⁹⁰ *In re Madeira's Estate* (Pa. Orphans' Court, 1938), 33 D. & C. 717, 52 York 137.

¹⁹¹ S. D. Code (1939) §§ 35.0701 to 35.0708 (amended by S. D. Laws 1945, c. 152).

not exceeding \$5,000, does not exceed \$750 and the decedent is survived by a spouse or one or more minor children. A verified petition for such summary administration may be filed by an heir, legatee, devisee or creditor, setting forth the fact of decedent's death and whether he left a will; the names and addresses of all heirs, legatees and devisees, and also, so far as known, of creditors with the amounts owing to each; a statement of the character and value of all property left by the decedent; and the facts in regard to any homestead and the persons entitled thereto. Notice of the hearing on such petition must be published for three weeks and mailed to all heirs, legatees, devisees and creditors at least ten days prior to the date set for hearing. If upon the hearing the court determines that the essential facts exist, it may proceed in a summary manner to adjust and determine the respective rights of all persons interested including creditors and the rights in regard to homestead and exempt property. It may also probate a will if there be one. It is authorized to make findings of facts and conclusions of law and to distribute the estate, first, in payment of court costs incurred, second, to those entitled to exempt property and homestead, third, to creditors, and fourth, to heirs, legatees and devisees. Such decree has the same effect as a final judgment and may be recorded. No further action is required for the distribution of the estate. If necessary for such distribution, the court may order the sale of any property other than the homestead. The entire responsibility for collecting and distributing the estate is upon the judge. He may not appoint an agent for these purposes.¹⁹² If such petition is dismissed, regular probate proceedings may be instituted. Even in an appropriate case, summary administration is not an absolute requirement; the court may, in its discretion, require regular administration.

¹⁹² *Smith v. Terry Peak Miners' Union*, 16 S. D. 631, 94 N. W. 694 (1903).

if it finds that the circumstances are such as to render it for the best interests of those interested in the estate.

A Vermont statute ¹⁹³ provides that if a husband dies leaving a widow or minor children or both, or if a wife dies and leaves minor children and no surviving husband, and the estate does not exceed \$300 or is not sufficient to pay the debts and expenses of settlement and leave a balance of \$300, the court in its discretion may assign the estate to the value of \$300 to the minor children or to the widow or for their joint use and benefit.

As previously mentioned, the prime purpose of this kind of legislation is to make available to a decedent's family a modicum of economic resources without delay and at a time when the cessation of regular earnings are likely to be felt most acutely by them. To the family of small means the value of such procedure is at once apparent. To compel the surviving family to await the termination of a usual administration would be most unjust; and in addition, it would decrease the amount distributable to them by the expenses of administration and would keep the property out of commerce for an interval of time. "Practical and common sense statutes . . . which facilitate the transaction and convenience of public business, at a minimum expense, and that, too, without doing an injury to creditors and other persons" is the characterization of these statutes by the Supreme Court of the state of their origin.¹⁹⁴

The restrictions on the rights of heirs generally to collect and sue for debts due a decedent, in the absence of administration, will be discussed hereafter. Suffice it to say at this point that such actions are ordinarily not permitted, but the heirs are required to have a personal representative appointed in order to make an effective collection of the assets belonging to the estate. Under statutes of the kind now under con-

¹⁹³ Vt. Pub. Laws (1933) § 2831.

¹⁹⁴ *Parsons v. Harvey*, 281 Mo. 413 at 427, 221 S. W. 21 (1920).

sideration, however, the heir becomes the "authorized agent of the law to collect debts and give acquittances."¹⁹⁵ Without such authority, having its genesis in a denial rather than a grant of administration, the heir is powerless to make collection of property to which he and others will ultimately be entitled. An estate of sufficiently small quantity to come under the statutory amount will not of itself entitle the heir to sue to collect assets. He must first secure a judicial determination that such facts exist and the corresponding authority to proceed in this fashion.¹⁹⁶

Upon slight reflection the reasonableness of such a requirement appears. Some sort of showing is necessary to call this exceptional short-cut into play. A court having control over such functions will respond upon proper proof. Creditors are entitled to this amount of protection, at least. Furthermore, more than one person may claim to be the heir or next of kin entitled to the estate. This slight judicial supervision will stave off potential controversies among heirs and creditors in the vast majority of cases. In addition, debtors are afforded explicit assurance of the discharge of their obligations upon making payment to the one thus authorized to make collection. It would, of course, be unsafe to make the heirs the exclusive judges of the applicability of the statute to the facts of a particular case.¹⁹⁷

The order of the court denying administration is the equivalent of a judgment or decree, it is entitled to corresponding

¹⁹⁵ *Bradley v. Raulerson*, 66 Fla. 601, 64 So. 237 (1914); *Coral Gables First National Bank v. Hart* (Fla. 1945), 20 So. (2d) 647 at 648. And the person to whom it is set off may perfect his or her title as by a suit to quiet title. *Bassett v. South*, 87 Ind. App. 136, 156 N. E. 410, 158 N. E. 229 (1927).

¹⁹⁶ *Chenoweth v. McDowell*, 26 Ariz. 420, 226 P. 535 (1924); *Phifer v. Abbot*, 68 Fla. 10, 65 So. 869 (1914); *Noblett v. Dillinger*, 23 Ind. 505 (1864); *Griswold v. Mattix*, 21 Mo. App. 282 (1886); *McMillan v. Wacker*, 57 Mo. App. 220 (1894); *Adey v. Adey*, 58 Mo. App. 408 (1894). But in *Mahoney v. Nevins*, 190 Mo. 360, 88 S. W. 731 (1905) it was held that a surviving widow was entitled in equity to be recognized as the owner of an estate less than \$400 without proceeding to have it set off to her.

¹⁹⁷ *Bradley v. Raulerson*, 66 Fla. 601, 64 So. 237 (1914).

recognition,¹⁹⁸ and it cannot be collaterally attacked.¹⁹⁹ While such an order or decree remains in force a personal representative may not be appointed.²⁰⁰ Nor may the valuation of the property set aside be assailed in a different proceeding.²⁰¹ Nor may an action to collect assets by the next of kin be defeated by showing an indebtedness against the estate.²⁰² Likewise the setting off of the estate to a person erroneously determined to be an heir cannot be questioned in a different proceeding.²⁰³ If the decree is to be assailed at all, it must be done directly, by appeal or by steps appropriate to revoke it. Such a procedure is expressly provided in the statutes of Florida, Kentucky and Missouri and is to be found in the general procedure sections of other probate codes.²⁰⁴

It is conceivable that regular administration might be preferable to the summary setting off of a small estate in a given case due to the existence of certain problems or conflicts of interest. The statutes of Kentucky, South Dakota and Vermont expressly make their use discretionary with the judge, while all others appear to be subject to invocation as of right.²⁰⁵

¹⁹⁸ *Eisenmayer v. Thompson*, 186 Cal. 538, 199 P. 798 (1921); *McMillan v. Boese*, 45 Cal. App. (2d) 764, 115 P. (2d) 37 (1941); *Johnson v. Johnson*, 53 Cal. App. (2d) 805, 128 P. (2d) 617 (1942); *Downs v. Downs*, 17 Ind. 95 (1861); *Boyden v. Ward*, 38 Vt. 628 (1866).

¹⁹⁹ Although often called inferior courts, probate courts are courts of record in almost every state, and, within the orbit of their jurisdiction, their decrees are entitled to the same weight as those of courts of general jurisdiction. See Simes and Basye, "Organization of the Probate Court in America," 42 MICH. L. REV. 965 at 990-992 (1944), pp. 415-417, *supra*.

²⁰⁰ *Nelson v. Troll*, 173 Mo. App. 51, 156 S. W. 16 (1913).

²⁰¹ *Downs v. Downs*, 17 Ind. 95 (1861).

²⁰² *Coral Gables First National Bank v. Colee* (Fla. 1945), 20 So. (2d) 675.

²⁰³ *Coral Gables First National Bank v. Hart* (Fla. 1945), 20 So. (2d) 647.

²⁰⁴ Fla. Stat. Ann. (Supp. 1945) § 735.09; Ky. Rev. Stat. (1944) §§ 395.460, 395.500; Mo. Rev. Stat. Ann. (1942) § 2. The rights of creditors and other persons may still be asserted in the court ordering summary distribution. Fla. Stat. Ann. (Supp. 1945) § 735.11; *Parsons v. Harvey*, 281 Mo. 413, 221 S. W. 21 (1920).

²⁰⁵ The discretionary character of these statutes will not permit a successful appeal from an order denying a petition filed to obtain summary distribution. *Frost v. Estate of Harlow Frost*, 40 Vt. 625 (1868).

Several variations are to be noted among these statutes. Some are predicated primarily upon the existence of a small estate and the survival of particular members of the decedent's family who would be entitled to the entire estate as exempt property, homestead, or as a family allowance if administration were had in the usual manner, while others are predicated solely upon the existence of a small estate and attempt to provide for its distribution to those entitled, whether they be the surviving family, next of kin or creditors, or some of each.²⁰⁶ The first group of statutes is limited in its application primarily to those estates in which creditors are not entitled to share; the second group is intended to apply when the estate is of such small size that it should be administered simply, summarily and with the least possible expense and delay. In these latter cases, more conflicts of interest as between distributees are likely to arise, and yet the very size of the estate is such as to make real conflicts rare. As in the case of summary distribution by a personal representative, the rights of distributees are usually made subject to expenses of the funeral and last sickness.²⁰⁷ But the rights of other creditors are ordinarily subordinated to the paramount social interest of providing for the surviving family.

It may be objected that such statutes open the door to fraud upon creditors either through a process of concealing assets or by withdrawing assets from judicial inspection such as could ordinarily be observed from the inventory. Legislation of this

²⁰⁶ In the first category are the statutes of California, Idaho, Indiana, Kentucky and Missouri. In the second category are those of Arizona, Colorado, Michigan, Nebraska, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina and Virginia. The statutes of Florida, Nevada, South Dakota and Vermont must be classified under both types, i.e., as applying when there is a small estate and certain members of the decedent's family survive. See *Turner v. Campbell*, 124 Mo. App. 133, 101 S. W. 119 (1907), indicating this limitation upon the application of the Missouri statute.

²⁰⁷ *Fleming v. Henderson*, 123 Ind. 234, 24 N. E. 236 (1890). But see *In re Ulrice's Estate*, 177 Mo. App. 584, 160 S. W. 812 (1913), where it was held that the widow's allowance of absolute property is paramount even to funeral expenses and expenses of administration.

kind has also been challenged on the ground that creditors are deprived of their property without due process of law.

As to fraud, such is always a possibility even when an administration runs its full course. An examination of the statutes of the kind under consideration reveals that most, if not all, of them require a sworn petition or affidavit to be filed to entitle the applicant or petitioner to a summary distribution of the estate. There is no more reason why the concealment of assets could be effected under such circumstances than when there is a full administration. The limited judicial contact with the surviving family of the decedent furnishes no fertile medium for the practice of fraud or the concealment of assets. In any case, the statutes provide that the court may revoke its order of summary distribution upon a showing of other or further assets.²⁰⁸ Creditors would seem to have ample protection by this provision alone, not to mention their power to ask that the order or decree be set aside for fraud, if such is found to exist.

As to the constitutionality of such legislation in the face of the objection that such a procedure deprives creditors of their rights without due process of law, two things may be said. If the rights of the decedent's family in his small estate by virtue of homestead, exempt property, family allowance and the like are superior to those of creditors, then the latter have not been affected adversely. On the other hand, if the rights of creditors are superior to those of the decedent's family, then the statute authorizing a summary distribution to the latter does not extinguish the creditor's right. Whatever right he had against the decedent is merely transferred as a chose in action against the heir who has received distribution. On this precise point the language of the Supreme Court

²⁰⁸ The California statute explicitly so provides. A general power of revocation is contained in the Florida, Kentucky and Missouri statutes. A like power doubtless prevails elsewhere under the general power of courts over their own judgments.

of Florida in the case of *Coral Gables First National Bank v. Hart* ²⁰⁹ is quite explicit:

“Under the law of this state (Probate Act) personal and real property descends to the heirs. Since devolution is a matter of legislative discretion, it is entirely competent for the legislature to say that any kind of property shall pass direct to the heirs rather than be suspended until a personal representative be appointed and vest in the heirs through him. Unsecured creditors are at all times subject to the caprice of the legislature in so far as estates are concerned. While it is proper that their claims be paid and they may apply for letters of administration but if they fail to do this and the heir secures an order of ‘No Administration Necessary’ then they may sue the heir to collect the debt. In other words, the most they have at any time is a chose in action and they may sue the heir who secured the order to collect the debt. They had no property right before the Act was passed and no property right was taken from them by it. *Heirs of Ludlow v. Johnston*, 3 Ohio 553, 17 Am. Dec. 609.”

2. *A method for distributees who die during administration*

It sometimes happens that an heir or distributee who will ultimately be entitled to a portion of an estate being administered dies before final distribution of that estate. The decree of final distribution strictly determines only who are the heirs of the senior decedent and makes distribution to them. Proper procedure would suggest that the heir's estate should also be administered and his share in the ancestor's estate distributed to his heirs. On the other hand, it is apparent that the second administration may be unnecessary in certain situations. In the early California case of *McClellan v. Downey*, ²¹⁰ a husband died intestate leaving only community property to be administered. He was survived by his wife and six children, two of the children being by a former marriage. The wife

²⁰⁹ (Fla. 1945), 20 So. (2d) 647 at 649.

²¹⁰ 63 Cal. 520 (1883).

died during the administration of her husband's estate. Administration on her estate was then had and completed before final distribution of her husband's estate. But the decree of final distribution did not include her interest in the community property. Upon the subsequent distribution of the husband's estate the wife's interest in the community property was ordered distributed directly to her heirs, "*no creditor of hers objecting.*"²¹¹ The court admitted that it would have been more orderly to have had her interest in her husband's estate distributed to her heirs by the decree of distribution of her estate, or to have made distribution of any personalty to her administrator for the purposes of administration, but it held that it had the *power* to make distribution of the wife's interest in her husband's estate directly to her heirs under the dictate of the statute which required it to distribute the residual estate of a decedent "among the persons who by law are entitled thereto."²¹² The power of probate courts to make distribution to the secondary next of kin has been declared in a small number of cases,²¹³ provided there are no creditors of the decedent.

When the heir or distributee who dies prior to the final distribution of the ancestor's estate is an unmarried minor, it

²¹¹ 63 Cal. 520 at 523 (1883). (*Italics the court's.*)

²¹² Cal. Prob. Code Ann. (Deering, 1944) § 1020.

²¹³ *Johnson's Adm'r v. Longmire*, 39 Ala. 143 (1863); *Fretwell v. McLemore*, 52 Ala. 124 at 133 (1875); *Ward v. Ives*, 75 Conn. 598, 54 A. 730 (1903); *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293 (1900); *Maxwell v. Craft*, 32 Miss. 307 (1856); *Watson v. Byrd*, 53 Miss. 480 (1876); *In re Riley's Estate*, 92 N. J. Eq. 567, 113 A. 485 (1921); *Matter of Losee*, 46 Misc. 363, 94 N. Y. S. 1082 (1905); *Young v. Kennedy*, 95 N. C. 265 (1886); *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371 (1888); *Cook v. Nelson*, 209 Wis. 224, 244 N. W. 615 (1932). In the New Jersey case of *In re Riley's Estate*, *supra*, the court said that only the Court of Chancery, and not the orphans' court, in New Jersey could order distribution to the secondary next of kin and thus dispense with administration. In the Alabama cases it was said that it was within the province of equity to thus dispense with administration when it appeared that there were no debts or that administration had not been taken out.

may be presumed that he had no capacity to make a will and was incapable of contracting binding obligations. Under these circumstances his estate could safely be distributed to his heirs in connection with the final distribution of the primary estate, undiminished by debts or expenses of administration. By an amendment in 1866 to one of its statutes on distribution of estates, California provided that if a decedent "shall have left him or her surviving several children, or one child and the issue of one or more other children, and if any one of such surviving children shall before the close of administration have died while under age and not having been married, no administration on such deceased child's estate shall be necessary, but all the estate which come to the deceased child by inheritance from such deceased parents shall without administration be distributed to the other heirs as prescribed by law."²¹⁴ This statute has since been broadened in California²¹⁵ to include any heir, devisee or legatee who is issue of a decedent, and also to authorize distribution directly to his heirs at law in the case of his death intestate while under age and not having been married, before final distribution of the ancestor's estate. The result in most cases will be that distribution of the ancestor's estate will be made to the other heirs of the ancestor whose shares will thus be augmented, since they are his heirs also. Similar statutes have since been adopted in Arizona,²¹⁶ Idaho,²¹⁷ Montana,²¹⁸ North Dakota,²¹⁹ Oklahoma,²²⁰ South Dakota,²²¹ Utah²²² and Wyoming,²²³ all patterned after the early California statute.

²¹⁴ Cal. Stat., 1865-1866, c. 297, § 2, p. 329.

²¹⁵ Cal. Prob. Code Ann. (Deering, 1944) § 1022.

²¹⁶ Ariz. Code (1939) § 38-1504.

²¹⁷ Idaho Laws Ann. (1943) § 15-1306.

²¹⁸ Mont. Rev. Code (1935) § 10327.

²¹⁹ N. D. Rev. Code (1943) § 30-2106.

²²⁰ Okla. Stat. (1941) t. 58, § 631.

²²¹ S. D. Code (1939) § 35.1705.

²²² Utah Code (1943) § 102-12-7.

²²³ Wyo. Rev. Stat. (1931) § 88-3601.

With the exception of Arizona these statutes are limited in their operation to unmarried minors and cannot be applied to dispense with administration on the estate of a deceased adult heir.²²⁴ In Arizona it is required only that the heir dying before the close of administration be a child of the decedent in order for the statute to apply.

The function of such legislation is to avoid two administrations when the court already has jurisdiction of one estate, and in that same proceeding may readily determine the persons who are entitled to the share of the deceased heir and order distribution directly to them. The in rem nature of the proceeding is sufficient to justify the court's exercise of such power. At the same time it may well be realized that secondary administration may be preferable in large estates of minors, or if there be indebtedness of the minor, as for necessities. But if the estate is small, this statutory permission to avoid an administration answers a need in a sensible manner. Without exception, however, the operation of these statutes is independent of the size of the estate.

3. *A method for persons who die while under guardianship*

Another type of statute comparable in function to those just discussed but somewhat different in operation concerns minors or other persons who die while under guardianship. The justification for dispensing with administration upon the estate of a minor or incompetent who dies while his estate is being administered by a guardian should depend primarily upon an ability to determine with reasonable certainty the existence of liabilities against the ward. Since such a ward cannot ordinarily incur debts, it may be said that the guardian, who has incurred and presumably knows of all outstanding obligations against the ward, should be permitted to pay them and dis-

²²⁴ In re Skelly's Estate, 32 S. D. 381, 143 N. W. 274 (1913).

tribute the estate remaining in his hands in much the same manner as a personal representative would do. On the contrary it may be argued that the ward may be liable on obligations incurred before the inception of the guardianship, for torts committed by him or for some other obligation which the guardian did not incur or is not aware of. In passing upon the merits of the statutes to be discussed in this connection, the machinery afforded to creditors to obtain payment of their claims during the lifetime of the ward as well as after his death will be an important factor.²²⁵

Upon the termination of a guardianship by the death of a ward, a guardian is ordinarily required to make an accounting.²²⁶ Distribution of the ward's estate is then made to a personal representative to be appointed. In an attempt to dispense with a formal administration, however, legislation has been adopted in several states to provide for distribution of the ward's estate by the guardian directly without requiring the appointment of a personal representative. According to such legislation the guardian, after making the required accounting upon the death of the ward, is authorized to make distribution of the residual estate directly to the distributees. It is intended to render unnecessary both the appointment of a personal representative and a complete formal administration on the ward's estate.

In Arkansas²²⁷ and Missouri²²⁸ it is provided that if a minor under guardianship dies, no letters of administration

²²⁵ In most states creditors are not notified or afforded an opportunity to present their claims in a guardianship proceeding as they are in a probate proceeding. A few statutes do so provide, however. See Wis. Stat. (1943) § 319.41. To enforce payment on contracts or torts of the ward, in most states an action must be commenced against the ward personally, which action may be defended by the guardian. See *George & Ratcliffe v. Dawson's Guardian*, 18 Mo. 407 (1853).

²²⁶ Such a provision is a part of most guardianship statutes.

²²⁷ Ark. Dig. Stat. (1937) §§ 6246, 6247.

²²⁸ Mo. Rev. Stat. Ann. (1942) §§ 427, 428. These statutes formerly purported to apply to all minors under guardianship. However, they were later

need be granted upon his estate unless he leaves obligations, or unless he leaves a valid will, but that the probate court shall proceed to authorize distribution of the personal estate by the guardian among those interested.

A Pennsylvania statute²²⁹ adopted in 1931 similarly provides for distribution by the guardian of a deceased minor ward to creditors and distributees under the intestate law, unless it appears that the estate is involved or is likely to be involved in litigation, in which case distribution of the estate is made to a personal representative who must be appointed for the ward's estate. This statute depends upon judicial discretion for its application. Notice to creditors is usually given by advertising the final account.²³⁰

A recent Colorado statute²³¹ applies in the case of the death of any person under guardianship, whether a minor or other incompetent. The guardianship is continued and the estate of the decedent administered in the same proceeding; thereafter the guardian is designated as an administrator, unless the decedent dies testate, in which case the executor or other personal representative appointed shall administer the estate. The court may make any orders necessary to protect creditors and other interested parties.

Statutes in Delaware²³² and Georgia²³³ contemplate that no new administration shall be opened in the case of the death of any incompetent under guardianship, but that the guardian shall distribute the estate in the same manner as if he had been appointed administrator.

construed in *Norton v. Thompson*, 68 Mo. 143 (1878) as inapplicable to married minors. The statutes have since been amended accordingly.

²²⁹ Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 872.

²³⁰ *Templar's Estate* (Pa. Orphans' Ct. 1940), 38 D. & C. 288. In this case the court indicated that it would be inclined to authorize such a distribution when it was affirmatively shown that the funeral and medical expenses have been paid or provided for and the next of kin joined in the petition for distribution by the guardian.

²³¹ Colo. Stat. (Supp. 1944) c. 176, § 89(5). This statute was adopted in 1941.

²³² Del. Rev. Code (1935) § 3096.

²³³ Ga. Code Ann. (1936) § 49-316.

Likewise in Illinois²³⁴ a guardian or conservator of a deceased ward's estate is authorized under the letters of guardianship previously issued to him to administer the estate of the deceased ward without further letters of administration, unless within thirty days after death a petition for letters testamentary or of administration is filed. If letters are so granted, the executor or administrator shall supersede the guardian or conservator in the administration of the estate.

An Indiana statute²³⁵ provides that upon the death of a ward whose personal estate does not exceed \$500, the guardian may proceed to settle the ward's estate without letters of administration. Claims against the estate may be filed, litigated or allowed and paid the same as in cases of executors or administrators, and distribution of the estate made under the same rules and regulations.

In Wisconsin,²³⁶ a statute provides similarly with respect to the estate of any person other than a minor under guardianship whose total estate does not exceed \$300. The guardian is authorized to pay funeral expenses and expenses of the ward's last sickness. In other guardianship matters in which notice to creditors has been given and the ward owned only personal estate of a value not to exceed \$1,000, the court, upon notice to all interested parties, may order the guardian to pay funeral expenses together with expenses of the guardianship and all liabilities incurred by the guardian, and distribute the balance to the heirs of the deceased ward.

Statutes in Massachusetts²³⁷ and Vermont²³⁸ authorize the guardian of a deceased ward to pay the funeral expenses of the ward. When the estate is sufficiently small that the entire amount is so consumed, the need for a separate administration is thus avoided.

²³⁴ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 476.

²³⁵ Ind. Stat. (Burns, 1933) § 8-135.

²³⁶ Wis. Stat. (1943) § 319.32.

²³⁷ Mass. Ann. Laws (Supp. 1944) c. 201, § 48A.

²³⁸ Vt. Pub. Laws (1933) § 3282.

All of these statutory devices represent bona fide attempts to dispense with the necessity for a separate administration proceeding. They apply only when a guardian has been acting under the supervision of the probate court. In most instances he is cognizant of all obligations against the ward's estate. In all probability he has incurred them. If this is true and it can be determined that the guardian has paid and satisfied all outstanding indebtedness from funds in his hands, there is no reason why distribution of the ward's estate should not be made by the guardian directly to the distributees entitled to it. Doubtless this could be done as a practical procedure in the vast majority of instances with reasonable assurance that no creditor was overlooked.

But if there remains some outstanding indebtedness against the ward at the time of his death, it may be inquired at this point what procedure is available for determining it and what devices may be employed by creditors to assert and enforce payment of their claims. In an early Missouri case ²⁸⁹ creditors of a deceased ward presented their claim to the guardian and sought its allowance in the county court which had jurisdiction over the guardian and continued to exercise it pursuant to the statute authorizing distribution of the ward's estate direct to the distributees upon his death. It was held, however, that the county court had no jurisdiction to allow claims against the estate of the deceased ward, and further, that the statute was not intended to apply when there were outstanding debts. No indication was made as to how the existence or non-existence of debts was to be determined. The tacit assumption necessary for the application of the Missouri statute was that no outstanding indebtedness does actually exist. Its practical uselessness in that state may be inferred from the fact that there are no reported cases in which use of the statute has been attempted in nearly three quarters of a century.

²⁸⁹ *George & Ratcliffe v. Dawson's Guardian*, 18 Mo. 407 (1853).

The Indiana statute likewise provides for an accounting by the guardian upon the ward's death and for settlement of the ward's estate without letters of administration. The defect of the Missouri statute, however, has been provided against. Express provision is made for the filing and allowance of claims in the settlement of the estate by the guardian in the same manner as when settlement is made by an executor or administrator. In a recent Indiana case ²⁴⁰ a guardian attempted to function under this statute and refused to allow or pay a claim presented after the expiration of some two years subsequent to the death of the ward. The creditors excepted from his final accounting and also from the non-allowance and non-payment of their claims. No notice to creditors had been published. The Supreme Court of Indiana declared that the statute contemplated merely that new letters of administration need not issue to a personal representative but that the guardian, under the letters already issued to him, should proceed to administer the estate under the same rules and regulations applicable to an executor or administrator. In other words, he must publish notice to creditors and of final settlement as he would do in administering on a decedent's estate. The net result of this conception of the Indiana statute is that it operates to dispense with the necessity of issuing new letters of administration. In function, though not in name, the guardian is transformed into an administrator.

Though statutes of the kind under consideration may have contemplated some summary distribution of a deceased ward's estate by his guardian, it seems clear that this is not always practical. Furthermore, the estate of an insolvent decedent is marshalled for creditors quite differently from the estate of an insolvent ward under guardianship. Creditors are entitled to protection and consideration comparable to that ac-

²⁴⁰ Board of Commissioners of Hamilton County v. Pardue, 214 Ind. 579, 16 N. E. (2d) 884 (1938).

corded them in the administration of a decedent's estate. To permit the guardian to function as an administrator to save expenses, and to have the settlement and distribution of the estate occur in the same court and in the same proceeding are sensible and sound objectives.²⁴¹ But to dispense with notice to creditors or other safeguards employed in an ordinary administration proceeding is neither desirable nor justifiable.

On the whole, the Indiana and Colorado statutes seem to provide a sound method for merging the administration proceeding with the guardianship proceeding.²⁴² Notice to creditors and other safeguards applicable to an ordinary administration proceeding are provided for. While the Illinois statute seems to permit a short-cut, it authorizes a guardian or conservator to make distribution of his deceased ward's estate direct to the persons entitled, only if a petition for letters testamentary or of administration is not filed within thirty days following the ward's death. Creditors and other persons are thus afforded a reasonable period of time to apply for administration, failing which summary distribution to the heirs may be made. While no case has yet arisen in Illinois, a personal representative subsequently appointed would probably be entitled to recover from the heirs the property received by them from the guardian. The thirty-day provision is doubtless a counterpart of another Illinois statute,²⁴³ to be referred to later in another connection, which authorizes any person or corporation indebted to or holding personal

²⁴¹ *Edwards v. Edwards*, 145 Ill. App. 457 at 460 (1908).

²⁴² In *Wingate v. James*, 121 Ind. 69, 22 N. E. 735 (1889), the court ordered the sale of a ward's real estate to pay a judgment. Before the sale was made the ward died. Nevertheless the guardian sold the land without obtaining a new order. In upholding the sale, the court said: "When the fact of the ward's death, and the amount and condition of her estate, were reported, the jurisdiction of the court over the settlement of the ward's estate were continued precisely as if the ward had remained in life. The proceedings were properly continued in the matter of the guardianship; the guardian proceeding, as such, to the settlement and distribution of the estate."

²⁴³ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 478, discussed in subdivision III-D-2, *infra*.

property of a decedent to turn it over to certain surviving members of his family, provided that no letters are then outstanding and no petition therefor is then pending, and that thirty days have elapsed since the death of the decedent.

If a guardian proceeds to administer and make distribution of the estate, as is contemplated in the Indiana and Colorado statutes, he is entitled to exercise all the powers of an executor or administrator and he is subject likewise to the same duties.²⁴⁴ But it should be noted that the effect of such statutes is to alter somewhat the functions of a guardian. Before the death of the ward, he carries out various activities for a living person. After the death of the ward, he administers and accounts for the estate of a deceased person. The statutes add nothing to the estate under his management and control. They do give him additional power to close up the estate.²⁴⁵ This transformation of function is a small aid, but only a small aid, in the simplification of the problem of administration. They save the necessity of appointing a personal representative, but otherwise administration proceeds in the usual manner. If the ward has left a valid will and appointed an executor, such statutes should not and ordinarily do not apply.²⁴⁶ It is hard to justify such legislation as exists in Arkansas and Missouri unless an estate is of such small size as to come under the provisions of some other statute justifying summary administration or distribution. Thus the Indiana statute is limited in its operation to estates less than \$500 and the Wisconsin statute to estates less than \$300 and \$1,000, respectively. And the Orphans' Court of Philadelphia has indicated

²⁴⁴ This is implied in the Colorado statute. See also *Hire v. Hrudicka*, 379 Ill. 201, 40 N. E. (2d) 63 (1942); *Wingate v. James*, 121 Ind. 69, 22 N. E. 735 (1889).

²⁴⁵ *People v. Harms*, 187 Ill. App. 140 (1914).

²⁴⁶ *Belleville Sav. Bank v. Schrader*, 214 Ill. App. 388 (1919); *Keener v. Ochsenrider*, 85 Ind. App. 156, 149 N. E. 101 (1925). But if there is no will or if the executor named cannot serve, the guardian has been held entitled to administer the estate as against the next of kin. *Lang v. Friesenecker*, 213 Ill. 598, 73 N. E. 329 (1905).

that it will apply the Pennsylvania statute only in estates less than \$1,000.²⁴⁷

Despite the infrequent application of these statutes, it may be possible to increase their utility. If a notice to creditors could be combined with a notice of the guardian's final accounting, opportunity would thus be afforded creditors to present their claims on or before the hearing on the final account. If ample time is thus allowed, such a notice may be deemed the equivalent of notice to creditors in an administration proceeding, and the period of time so allowed, as a reasonable nonclaim period. This practice is apparently followed by the Pennsylvania Orphans' Court of Philadelphia County.²⁴⁸ The Wisconsin statute is also applicable to estates of less than \$1,000 worth of personal property where notice to creditors has been given in the guardianship proceedings.

4. *A method for community property*

The administration of community property in those states having the community property system presents certain problems that deserve special consideration in dispensing with administration on such property. Upon the death of either spouse, one-half of the community property is said to go to or belong to the surviving spouse while the other half is subject to the testamentary disposition of the deceased spouse.²⁴⁹ In some of these states if either spouse dies intestate, the entire community property passes to the survivor.²⁵⁰ It has been

²⁴⁷ *Templar's Estate* (Pa. Orphans' Ct. 1940) 38 D. & C. 288.

²⁴⁸ *Templar's Estate* (Pa. Orphans' Ct. 1940) 38 D. & C. 288.

²⁴⁹ 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943) §§ 198, 202, 203.

²⁵⁰ This is true in California and Idaho. See 1 DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943) § 199.

held in some states that the community property is not liable for the wife's separate debts.²⁵¹

As a result of this immunity from the wife's obligations, administration on the wife's interest in the community property is deemed unnecessary if her surviving husband becomes entitled to all of the community property upon her death. Such is the implication of the California Probate Code.²⁵² The community property under the husband's control remains subject to the community debts. An Arizona statute²⁵³ specifically provides that if community property passes to a surviving husband, he may obtain a decree determining his ownership which, when recorded, will have the same effect as a decree of distribution. The appointment of a personal representative has been held futile under these conditions and properly subject to revocation.²⁵⁴ Similar statutes apply in Idaho²⁵⁵ and New Mexico²⁵⁶ when the wife dies intestate. There is also a provision in the California Probate Code²⁵⁷ for the determination of title to property which is affected by the death of a person, but it does not specifically refer to community property. A Nevada statute²⁵⁸ dispenses with administration on community property when the husband dies and the surviving wife or surviving wife and children pay or secure all the community debts.²⁵⁹ Similarly, a Texas statute²⁶⁰ provides that

²⁵¹ I DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY (1943) §§ 160-162.

²⁵² Cal. Prob. Code Ann. (Deering, 1944) §§ 201-203.

²⁵³ Ariz. Code (1939) § 38-2011.

²⁵⁴ *In re Anderson*, 18 Ariz. 266, 158 P. 457 (1916).

²⁵⁵ Idaho Laws Ann. (1943) § 14-113. Under the authority of this statute, administration has been held unnecessary upon the wife's estate in *State ex rel. Gallet v. Naylor*, 50 Idaho 113, 294 P. 333 (1930) and *Pierson v. Pierson*, 63 Idaho 1, 115 P. (2d) 742 (1941).

²⁵⁶ N. M. Stat. (1941) § 31-108.

²⁵⁷ Cal. Prob. Code Ann. (Deering, 1944) §§ 1170-1175.

²⁵⁸ Nev. Comp. Laws (1929) § 3365.

²⁵⁹ *Wright v. Smith*, 19 Nev. 143, 7 P. 365 (1885).

²⁶⁰ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3662. Administration has been dispensed with under the authority of this statute in the following cases: *Wall*

when either spouse dies intestate without children or separate property, the community property passes without administration to the survivor but it is charged with the debts of the community. In each case the community property is relieved of administration because of its immunity from the separate debts of the deceased spouse and its continued liability for community debts. Only in Nevada is the payment of community debts or the securing of their payment a condition precedent to the passing of full ownership and control to the surviving wife or surviving wife and children.

In connection with the administration of community property an Idaho statute ²⁶¹ deserves special mention. It provides that "When a marital community is dissolved by the death of either member thereof, thereafter, if the survivor shall die before proceedings shall have been commenced for the probate of the estate of the person who first died, and both have died intestate the estates of both of the said decedents may, by order of the court, be joined for probate in a single proceeding . . . provided the same person is . . . entitled to letters of administration in both estates. . . ." This statute seems to be unique in permitting the liquidation in one proceeding of the two estates of the members of a marital community.

D. INFORMAL FAMILY SETTLEMENTS

Despite the existence of an established procedure for the administration of estates heirs do not always avail themselves of this procedure. If the decedent leaves no debts or only such as the heirs are willing to pay, there may be no one to insist upon administration. And if the heirs can gain posses-

v. Clark, 19 Tex. 321 (1857); Ross v. Martin, 104 Tex. 558, 140 S. W. 432, 141 S. W. 518 (1911); Graves v. Smith (Tex. Civ. App. 1911), 140 S. W. 487; Antonio v. Stiles (Tex. Civ. App. 1944), 177 S. W. (2d) 246.

²⁶¹ Idaho Laws Ann. (1943) § 15-376. Cf. S. D. Code (1939) § 32.0909(10) cited at note 148, *supra*.

sion of or divide the decedent's property among themselves amicably, there may be no real justification for administration. Most states possess no legislation recognizing or condemning such settlements. In fact, it has often been said that the law looks with favor upon family agreements for the settlement of estates. Justice Cooley expressed this sentiment in an early Michigan case ²⁶² when he said: "Formal proceedings for the settlement of an estate are never necessary if all parties concerned can agree to dispense with them. . . . Family arrangements for this purpose, it is said, are favorites of the law, and when fairly made are never allowed to be disturbed by the parties, or by any others for them." That countless numbers of them have been effected successfully is within the experience of most lawyers. Sometimes, however, difficulties of collection or distribution are encountered; sometimes unexpected creditors' claims interpose obstacles; or problems of marketable title to land, registered securities or similar property arise long after a decedent's death and the informal settlement of his estate among the heirs. At this point it is

²⁶² *Browne v. Forsche*, 43 Mich. 492 at 500, 5 N. W. 1011 (1880). A definite sentiment to the contrary was voiced in an early California case, *Estate of Strong*, 119 Cal. 663, 51 P. 1078 (1898), wherein it was said at 119 Cal. 665-666:

"Whatever the law may be in other jurisdictions, there is nothing in our probate law which would, either expressly or by implication, exempt the property of this estate from the requirement of administration. The whole subject matter of dealing with the estates of deceased persons is one of statutory regulation, and the policy and intent of our statute very clearly contemplates that property of decedents left undisposed of at death . . . shall, for the purposes of ascertaining and protecting the right of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedents may be conclusively established. And such administration may be initiated and had at the instance of any person entitled under the law to administer upon the estate."

This statement, made at the time it was, should not be taken to reflect a permanent policy in California. Some of the most useful legislation for the purpose of dispensing with administration exists there. It is also true that administration was necessary in order to confer marketable title to the land in the above case, yet neither the vendors nor the vendee were seeking that objective. The public administrator alone desired administration.

proposed to examine the efficacy of these settlements as a substitute for an official administration.

In the first place it may be said that the body of law concerning the informal settlement of decedents' estates has been largely constructed by the judiciary. That a paucity of legislation exists on the subject is not surprising when it is considered that such settlements are confined to small estates for the most part, and that courts have worked out fairly satisfactory solutions to most controversies. Areas of doubt and uncertainty still remain in which debtors and heirs alike often take certain risks when formal administration is omitted. When there is a large estate the heirs prefer to have a formal administration so that property ultimately distributed to them will be free of any possible claims of creditors. Nevertheless informal settlements may also be effected in estates that cannot be classed as small. Only scattered legislation exists which explicitly recognizes the propriety and validity of such settlements. There is a wide feeling that our probate codes are in need of positive legislation dealing with this subject in its varied aspects and giving certainty and assurances instead of leaving doubts and compelling parties to assume risks for their acts.

Only a few statutes deal positively with the necessity for administration and the duty of the court to grant administration upon an estate. An Arkansas statute,²⁶³ for example, provides that no administration shall be granted unless, in the opinion of the court, it shall be necessary to preserve the estate from waste or damage or to protect the rights of creditors. Also a Colorado statute²⁶⁴ provides that administration may be dispensed with if there is no property in the state belonging to the deceased of sufficient value to justify administration, or if the testator at the time of his death was living

²⁶³ Ark. Dig. Stat. (1937) § 6.

²⁶⁴ Colo. Stat. (1935) c. 176, § 52.

outside the state and left no debts there. A Georgia statute²⁶⁵ provides that if a husband is the sole heir of his deceased wife, he may take possession of her estate without administration upon payment of her individual debts. These statutes are a recognition that the process of administration is more than an empty gesture to fill an office and that it should be required only when a real necessity exists therefor. A Texas statute²⁶⁶ provides that "No administration upon any estate shall be granted unless there exists a necessity therefor, such necessity to be determined by the court hearing the application." A companion statute²⁶⁷ provides that "such necessity shall be deemed to exist if two or more debts exist against the estate, or if or when it is desired to have the county court partition the estate among the owners."

There are, in addition, several statutes which direct the granting of administration unless the heirs desire to settle the estate without administration. In Arkansas²⁶⁸ the heirs of an intestate decedent, if all are of full age, may collect, manage, control and dispose of an estate if creditors consent or the claims of creditors are satisfied. Or if administration has already been granted, it may be revoked. Authority is conferred upon the heirs to sue for and collect all demands and property belonging to the estate. There is no requirement of administration under a Georgia statute²⁶⁹ when the heirs, distributees or legatees prefer to settle the estate without administration. If there are no debts, official recognition of such settlements has been provided by a new statute²⁷⁰ enacted in 1945. It provides that any heir of a decedent who

²⁶⁵ Ga. Code Ann. (1936) § 113-902.

²⁶⁶ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3356.

²⁶⁷ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3370.

²⁶⁸ Ark. Dig. Stat. (1937) §§ 1, 2, 3. Such an agreement may be entered into after administration has been granted, waiving further accounting by the administrator. *Herndon v. Adkisson* (Ark. 1945), 184 S. W. (2d) 953.

²⁶⁹ Ga. Code Ann. (1936) § 113-1314.

²⁷⁰ Ga. Laws 1945, Gov. No. 202.

has died intestate and upon whose estate no administration has been had may file a petition in the court of ordinary stating that there are no debts and that the heirs have agreed upon a division of the estate amicably among themselves and desire to settle the estate without administration, and praying for an order that no administration is necessary. The court may then make a decree declaring that formal administration is unnecessary. In Illinois²⁷¹ the court need not issue letters testamentary or of administration if it is satisfied that no federal estate or Illinois inheritance tax will be due and finds that all claims are paid, that all heirs, legatees or devisees are residents of Illinois, and that they are of legal age and desire to settle the estate without administration. A Kentucky statute²⁷² authorizes the court to dispense with administration on the estate of an intestate decedent upon the written agreement of all persons interested in the personal estate, in cases where there are no creditors or the heirs designate a trustee to collect claims and demands. Such an agreement may be executed on behalf of a minor or other person under disability by his guardian, curator or committee. And if administration has already been granted, it shall be revoked. A Florida statute²⁷³ likewise authorizes the court to dispense with administration when an estate of not more than \$2,000, exclusive of exempt property, is not indebted, and there is a sole heir or the heirs make division thereof amicably among themselves.

These are the legislative reliefs from administration. There are, in addition, some legislative prohibitions against administration after the expiration of a designated period of time.²⁷⁴ Most legislation of the latter kind is designed to bar claims of creditors generally, operating as a kind of special nonclaim

²⁷¹ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 227.

²⁷² Ky. Rev. Stat. (1944) §§ 395.450, 395.470, 395.480, 395.490.

²⁷³ Fla. Stat. Ann. (Supp. 1945) §§ 735.01 to 735.13.

²⁷⁴ See subdivision III-D-1, *infra*.

statute when there has been no administration, although some of the legislation merely relieves land from the lien of creditors' claims. One practical effect of these statutes is to preclude creditors from attacking these family settlements and demanding administration after the lapse of a specified time.

There remains to be considered the extent to which informal administrations may be carried out in the performance of the functions for which administration is ordinarily granted. Even in the absence of a specific statute, many cases have upheld the right of heirs to proceed without administration where assets are applied to the payment of debts. There is no vested right to the office of personal representative; and the state possesses no prerogative to demand an administration for the mere purpose of carrying out a procedure.²⁷⁵

The functions of administration have already been stated as being (1) to collect assets, (2) to pay debts, and (3) to make distribution of the residual estate to those entitled to it. It is commonly said that the title to a decedent's personalty passes to his personal representative. There is some truth in this statement. Its universal accuracy may be doubted, however. Suppose that no personal representative is appointed. Does it follow that the heirs do not under any circumstances become entitled to the decedent's property in the absence of administration? Can it be that rights can be thus extinguished? Some courts have seen fit to say that the personal representative possesses only a naked legal title or that an exception to the general rule will be made when no administration is granted. A different point of view is contained in the codes of some western states which provide that the title to a decedent's property shall pass directly to his heirs, devisees or legatees, but "all of his property shall be subject to the possession of the executor or administrator and to the control of the . . . court for the purposes of administration, . . .

²⁷⁵ *Christe v. Chicago, R. I. & P. Ry.*, 104 Iowa 707, 74 N. W. 697 (1898).

and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family.”²⁷⁶ In those states administration is unnecessary to the mere vesting of title, but vesting is made subject to administration in which liability for payment of debts is determined. Perhaps in the final analysis there is little practical difference in these two views. Even under the first view the title of the personal representative is very limited, to say the least. Under either mode of looking at it, interposition by him is but a recognized means of accomplishing the three functions of administration.

It will not be denied that the heirs have an interest in the personal property of a decedent and may enter into contracts for the division of it, valid as among themselves. Such contracts cannot by their very nature affect the right of creditors. It has often been stated as a general principle that the heirs may agree to divide and distribute the property of an estate when they are all of age and legal capacity and there are no debts against the estate. This principle itself is looked upon as an exception to the general rule that the title to personalty passes to the personal representative.

This exception, that the heirs by a division of the decedent's property among themselves may obtain full ownership of it, seems to have taken root from a practice prevailing where courts of equity have administered estates. As authority for recognizing the legal rights and ownership of heirs who have taken possession of a decedent's property without administration, courts have frequently cited decisions of Alabama and Mississippi. An examination of the earlier of these decisions, however, indicates that merely the “equitable title,” not the

²⁷⁶ Cal. Prob. Code Ann. (Deering, 1944) § 300. The following contain substantially identical language: Okla. Stat. (1941) t. 84, § 212; S. D. Code (1939) § 56.0102; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3314; Utah Code (1943) § 101-4-2; Wash. Rev. Stat. (1932) § 1366. See also N. D. Rev. Code (1943) § 56-0103.

"legal title," was recognized as being in the heirs in the absence of administration. For example, in *Miller v. Eatman*,²⁷⁷ one of the early cases on the subject, the Supreme Court of Alabama said:

"In courts of equity, where it is not necessary that the legal title should be vested in the plaintiff, an administration may be dispensed with, where the right is asserted by those who would be entitled to distribution, and where it is clear that there are no creditors to be prejudiced."²⁷⁸

In each instance the court required proof and made a determination that there were no creditors. Moreover, a court of equity, if asked to do so, would actually make a decree distributing the property of the decedent to the heirs so as to give them the same indicia of ownership as would be obtainable from a personal representative at the close of an administration. As said in the later Alabama case of *Fretwell v. McLemore*:²⁷⁹

"The rule to be extracted from these decisions is, that a court of equity will dispense with an administration, and decree distribution directly, when it affirmatively appears that, if there was an administrator, the only duty devolving on him would be distribution. Then administration is regarded as 'a useless ceremony.' An administrator or an executor is a trustee clothed with the legal title. He holds in trust for creditors and distributees or legatees. The creditors are entitled to charge the assets with the payment of their debts, in priority of the equity of distributees or legatees. When there are no debts, the equity of the distributees or legatees is perfect; the legal title, if there was a personal representative, would be a naked trust, which a court of equity ought not and would not permit to be interposed as a bar to the equitable title of the distributee or legatee."

²⁷⁷ 11 Ala. 609 (1847).

²⁷⁸ 11 Ala. 609 at 614 (1847).

²⁷⁹ 52 Ala. 124 at 133 (1875). See also *Watson v. Byrd*, 53 Miss. 480 (1876).

These words have often been cited elsewhere ²⁸⁰ as authority for dispensing with administration. In applying this principle, courts of other states have not been content to accept it as one to be applied only in courts of equity. They have readily extended it to various actions at law and without any antecedent decree of distribution in equity.²⁸¹ In a wide variety of situations heirs have been deemed to possess all the elements of legal ownership. What was once regarded as purely equitable doctrine to be applied in courts of equity has blossomed into full flower as a well recognized legal principle.

Reverting to the question previously raised, What becomes of the decedent's property if administration is not granted? May the heirs prevent the appointment of a personal representative? Does it follow that the heirs may never sue for and collect the decedent's property? Do they ever become entitled to the possession and ownership of it? And may they gain a marketable title? Perhaps simple, categorical answers are not feasible. The solutions to these inquiries, however, will circumscribe the areas in which administration may be dispensed with. We turn now to a consideration of each of the inquiries in relation to the stated functions of administration.

1. *Right of creditors to require administration
and enforce claims*

Let us assume that the heirs of a particular decedent have agreed upon a division of the estate among themselves, but that there are one or more outstanding creditors. Under what circumstances may the heirs successfully resist the demands of creditors that formal administration be granted? Will the claims of creditors also become barred in the absence of administration? Several possibilities need to be considered here.

²⁸⁰ For example, see *In re Riley's Estate*, 92 N. J. Eq. 567, 113 A. 485 (1921); *Murphy v. Murphy*, 42 Wash. 142, 84 P. 646 (1906):

²⁸¹ See the text and cases cited in the discussion following.

First, the heirs may pay the creditor directly and thus disable him from further demanding administration. A Texas statute²⁸² provides that they may defeat the application of the creditor "by the payment of the claim of such creditor." It is also sometimes provided that it may be defeated by proof that such claim is fictitious, fraudulent, illegal or barred by limitation.²⁸³

Second, provision is also made in Texas²⁸⁴ for the heirs to execute a bond conditioned to pay the debt. Creditors are thus given a new res as security for their debts in place of the estate which can be transmitted to the heirs without an official administration.

Administration has also been refused when the creditor had ample security for his debt,²⁸⁵ or where he could bring a direct action against the heirs themselves.²⁸⁶ Under a Texas statute²⁸⁷ already mentioned, necessity for administration on an estate is determined by the existence of at least two creditors. Where there is only one creditor, he is said to be adequately protected by permitting him to enforce his claim against the estate in the hands of distributees.²⁸⁸ This procedure resembles very closely that of the civil law under which the heir takes the decedent's property and at the same time becomes liable for his debts. Where several debts exist, the problem begins to suggest complications which justify a formal administration.

Finally there is a substantial body of legislation designed to encourage timely administration proceedings and to bar creditors who do not take appropriate steps to enforce their claims when others do not apply for administration. First,

²⁸² Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3340.

²⁸³ See, for example, Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3340. Similar provisions are found in many probate codes.

²⁸⁴ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3340, 3341.

²⁸⁵ Webb v. Trimble Bros., 143 Ky. 375, 136 S. W. 870 (1911).

²⁸⁶ Cross v. Hancock's Estate (Tex. Civ. App. 1943), 176 S. W. (2d) 586.

²⁸⁷ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3370. This statute applies only to decedents who die intestate.

²⁸⁸ Cross v. Hancock's Estate (Tex. Civ. App. 1943), 176 S. W. (2d) 586.

there is the group of statutes already referred to limiting the time for the granting of administration. Such statutes exist in Connecticut,²⁸⁹ Iowa,²⁹⁰ Kentucky,²⁹¹ Maine,²⁹² Massachusetts,²⁹³ Pennsylvania,²⁹⁴ Tennessee²⁹⁵ and Texas.²⁹⁶ There is a difference of opinion as to whether these statutes affect the power or jurisdiction of the court, or whether they are intended merely as statutes of limitation on the granting of letters.²⁹⁷ In Idaho it has been held that an administration proceeding is regarded as an "action" and is subject to the general four-year statute of limitations.²⁹⁸

Second, there are statutes in Colorado,²⁹⁹ Florida,³⁰⁰ Kansas,³⁰¹ Nebraska,³⁰² Oregon³⁰³ and Wyoming³⁰⁴ which

²⁸⁹ Conn. Gen. Stat. (1930) § 4909 (ten years except for good cause shown).

²⁹⁰ Iowa Code (1939) § 11891 (five years, except that if death occurs out of state, period does not begin to run until death is known; if property is discovered after the expiration of five years, administration may be granted only for the purpose of making distribution thereof).

²⁹¹ Ky. Rev. Stat. (1944) § 395.010 (twenty years). Administration granted thereafter is declared to be void.

²⁹² Me. Rev. Stat. (1944) c. 141, §§ 1, 2 (twenty years).

²⁹³ Mass. Ann. Laws (1932) c. 193, §§ 4, 5 (twenty years).

²⁹⁴ Pa. Stat. Ann. (Purdon, 1930) t. 20, § 342 (twenty-one years, except upon order of the Orphans' Court upon due cause shown). But letters granted after the expiration of twenty-one years without such an order have been held not to be absolutely void for all purposes. *Foster v. Commonwealth*, 35 Pa. St. 148 (1860).

²⁹⁵ Tenn. Code (Michie, 1938) § 8167 (ten years; twenty-two years for infant distributee).

²⁹⁶ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3325, 3370 (four years except where administration is necessary to recover funds or other property due the estate).

²⁹⁷ In Maine it has been held that the lapse of time deprives the probate court of any jurisdiction to grant administration. *Bean v. Bumpus*, 22 Me. 549 (1843). An early Tennessee case held similarly. *Rice v. Henly*, 6 Pick. (90 Tenn.) 69, 15 S. W. 748 (1891). But see *Weaver v. Hughes*, 26 Tenn. App. 436, 173 S. W. (2d) 159 (1943) which held that an appointment of an executor after the expiration of ten years could not be attacked collaterally.

²⁹⁸ *Gwinn v. Melvin*, 9 Idaho 202, 72 P. 961 (1903).

²⁹⁹ Colo. Stat. (Supp. 1945) c. 176, §§ 75, 76 (one year).

³⁰⁰ Fla. Stat. Ann. (1941) § 734.29 (three years).

³⁰¹ Kan. Gen. Stat. (Supp. 1943) § 59-2239 (personal representative must be appointed within one year).

³⁰² Neb. Rev. Stat. (1943) § 30-609 (two years).

³⁰³ Ore. Comp. Laws (1940) § 1-216.

³⁰⁴ Wyo. Laws 1945, c. 69 (two years).

purport to bar claims of creditors unless administration is granted within a specified time after death. These are special statutes of nonclaim applying in the absence of administration. The basic idea behind these statutes is that when the parties immediately interested in an estate fail to have an administrator appointed within the time fixed by the statute, then any creditor may cause one to be appointed, and the statute of limitations then begins to run against the creditor. Failure to apply for administration within the prescribed period operates to bar the claim as effectively as does the statute of nonclaim when administration has been granted.³⁰⁵ To permit the statutes of limitation to be tolled indefinitely in the absence of administration would be to defeat their fundamental purpose as statutes of repose. General nonclaim statutes operate only after administration is granted. There seems no adequate reason to authorize creditors to effect collection of their claims by demanding administration and at the same time toll the statute of limitations in their favor when they do not employ the means afforded to enforce their claims. In Michigan and Minnesota, statutes³⁰⁶ differing in form but not in substance require creditors to file their claims in the probate court within a designated period of time or be forever barred, implying that they or some other interested person must initiate proceedings for administration in ample time prior thereto.³⁰⁷

³⁰⁵ *Gilpen v. Bower*, 152 Fla. 733, 12 So. (2d) 884 (1943); *Nickel v. Vogel*, 76 Kan. 625, 92 P. 1105 (1907); *Brown v. Baxter*, 77 Kan. 97, 94 P. 155, 574 (1908); *Crow v. Hartzler*, 103 Kan. 800, 176 P. 651 (1918); *Timmonds v. Messner*, 109 Kan. 518, 200 P. 270 (1921); *Glathart v. Madden*, 122 Kan. 563, 253 P. 426 (1927); *In re Estate of Dumbuck*, 154 Kan. 501, 119 P. (2d) 476 (1941); *First National Bank of Superior v. Bradshaw*, 91 Neb. 714, 136 N. W. 1015 (1912) (dictum); *Crawford State Bank v. McEwen*, 132 Neb. 399, 272 N. W. 226 (1937); *Luikart v. Quinn*, 138 Neb. 849, 295 N. W. 890 (1941); *Stander v. Pankonin*, 141 Neb. 738, 4 N. W. (2d) 895 (1942); *Luse v. Webster*, 74 Ore. 489, 145 P. 1063 (1915).

³⁰⁶ Mich. Stat. Ann. (1943) § 27-3178(430) (six years); Minn. Stat. (1941) § 525.431 (five years).

³⁰⁷ *In re Wissers Estate*, 248 Mich. 393, 227 N. W. 752 (1929).

Third, statutes exist in Missouri,³⁰⁸ Nevada,³⁰⁹ New Hampshire,³¹⁰ New Mexico,³¹¹ Rhode Island,³¹² Washington³¹³ and Wisconsin,³¹⁴ prohibiting creditors from subjecting land of a decedent for the payment of their claims if administration is not granted within a designated period of time following death.³¹⁵ All statutes of this kind do not apply to personalty. They are primarily statutes of repose, passed in the interests of marketability of titles of land. Idaho statutes³¹⁶ provide a method for a determination of heirship after two years have elapsed from the date of death of a decedent upon whose estate administration is not contemplated in Idaho. Provision is made for creditors to file their claims in that proceeding, failing which all claims are barred.

In regard to the statute of limitations, it is ordinarily held that its running is interrupted from the date of death until the appointment of a personal representative.³¹⁷ Even if no such interruption occurred it would be difficult to determine with any great certainty when all debts have become barred, for

³⁰⁸ Mo. Rev. Stat. Ann. (1942) §§ 179, 180 (ten years).

³⁰⁹ Nev. Comp. Laws (1929) § 8534 (three years).

³¹⁰ N. H. Rev. Laws (1942) c. 355, §§ 29, 30 (two years).

³¹¹ N. M. Stat. (1941) § 33-804 (six years).

³¹² R. I. Gen. Laws (1938) c. 579, § 30 (six years).

³¹³ Wash. Rev. Stat. (1932) §§ 1368, 1370a (six years).

³¹⁴ Wis. Stat. (1943) § 316.01 (three years).

³¹⁵ *Austin v. Shipman*, 160 Mo. App. 206, 141 S. W. 425 (1911) (dictum); *Kling v. Greef Realty Co.*, 166 Mo. App. 190, 148 S. W. 203 (1912) (dictum); *In re Smith's Estate*, 25 Wash. 539, 66 P. 93 (1901); *Gleason v. Hawkins*, 32 Wash. 464, 73 P. 533 (1903); *Murphy v. Murphy*, 42 Wash. 142, 84 P. 646 (1906); *Fuhrman v. Power*, 43 Wash. 533, 86 P. 940 (1906); *State ex rel. Speckart v. Superior Court*, 48 Wash. 141, 92 P. 942 (1907); *Duvall v. Healy Lumber Co.*, 57 Wash. 446, 107 P. 357, 109 P. 305 (1910); *In re Mason's Estate*, 95 Wash. 564, 164 P. 205 (1917); *In re Peterson's Estate*, 137 Wash. 137, 241 P. 964 (1926); *Scott v. Stanley*, 149 Wash. 29, 270 P. 110 (1928) (dictum); *In re Mundt's Estate*, 169 Wash. 593, 14 P. (2d) 59 (1932) (dictum); *In re Patrick's Estate*, 195 Wash. 105, 79 P. (2d) 969 (1938); *Scholl v. Adams*, 206 Wis. 174, 239 N. W. 452 (1931); *Estate of Koebel*, 225 Wis. 342, 274 N. W. 262 (1937).

³¹⁶ Idaho Laws Ann. (1943) §§ 15-1401 to 15-1405.

³¹⁷ 2 WOERNER, ADMINISTRATION (3d ed. 1923) § 401. See also comment, "Executors and Administrators—Comparison of Nonclaim Statutes and the General Statutes of Limitations," 36 MICH. L. REV. 973 (1938).

maturity dates may not occur until long after death, or disabilities of creditors may prevent the continuous running of the statute. A North Dakota statute ³¹⁸ suspends the running of the statute of limitations upon death only until a creditor is authorized to apply for letters of administration. For the reasons mentioned, it is doubtful how effective this statute is for the purpose of determining the non-existence of creditors' claims at any particular time.

Closely associated with the liability of the decedent's property for his debts is its liability for inheritance or succession taxes. A frequent, though not universal, procedure, is for such taxes to be assessed in connection with or as a part of the administration proceeding. If administration is not had and there is no separate assessment of inheritance taxes, what is the duration of liability of the property of the estate in the hands of distributees? A common provision of tax statutes is that inheritance taxes remain a lien until paid, which is another way of saying that the statute of limitations does not run against the state on its claim for inheritance taxes. In some states this would compel an entire administration proceeding in order to obtain an assessment of inheritance taxes. Several states have statutes providing for the assessment and payment of taxes in a separate proceeding when no administration is had, or for a determination that none is due. Some statutes now provide that the claim of the state for such taxes is barred after the expiration of a stated period of time.³¹⁹ Such special

³¹⁸ N. D. Rev. Code (1943) § 30-1809.

³¹⁹ Ark. Stat. (Supp. 1944) p. 549, § 33 (seven years); Colo. Stat. (Supp. 1945) c. 85, § 38 (fifteen years); D. C. Code (1940) § 47-1603 (ten years); Fla. Stat. Ann. (1941) § 198.22 (ten years); Idaho Laws Ann. (1943) § 14-404 (five years after state auditor notified of death); Ill. Ann. Stat. (Smith-Hurd, 1940) c. 120, § 397 (five years after death as against purchaser); Ind. Stat. (Burns, Supp. 1943) § 6-2430 (ten years); Iowa Code (1939) § 7311 (five years except as to certain classes of beneficiaries succeeding to the decedent's estate); Kan. Gen. Stat. (Supp. 1943) § 79-1529 (ten years); La. Gen. Stat. (Dart, 1939) § 8587 (five years after opening of succession); Md. Code (1939) art. 81, § 121 (four years); Minn. Stat. (1941) § 291.14 (as to real estate, ten years after decree of final distribution); Miss.

limitation statutes are representative of a larger trend toward barring the state in respect to certain claims affecting land and promoting marketability. In some cases, however, these statutes of limitation bar the state only with respect to property in the hands of purchasers. Irrespective of the form of these statutes of limitation, they are intended primarily to promote marketability of titles and in some instances to give repose to the possession of the heirs.

2. *Right of heirs to collect assets*

The problem of making collection of assets belonging to an estate is the first concern of heirs where no administration is contemplated. It is often said that when there are no debts, the heirs may take possession of the estate without administration.³²⁰ An ability to make an effective collection is an essential for a successful informal settlement. If the heirs are already in possession of the decedent's property or can make a physical assembly of it, well and good; but when the assets include property in the hands of or claims against third persons, difficulties may be encountered. Immediately the question arises as to whether the heirs may successfully sue to recover specific property or a debt from the third party. It

Code (1942) § 9284 (three years); Neb. Rev. Stat. (1943) § 77-2037 (five years); N. C. Gen. Stat. (1943) § 105-404 (twenty years); Ore. Comp. Laws (1940) § 20-113 (six years after State Treasurer notified; seven years in case of non-resident decedent); Pa. Stat. Ann. (Purdon, Supp. 1944) t. 72, § 2443 (five years after death as against purchaser); Tenn. Code (Michie, Supp. 1941) § 1279, subdivision 7 (four years); Wash. Rev. Stat. (Supp. 1940) § 11201 (amended by Wash. Laws 1945, c. 184, § 1) (ten years); Wyo. Rev. Stat. (1931) § 115-1210 (five years in case of resident decedents, but limitation does not begin to run in case of non-resident until notice of death is filed with Inheritance Tax Commissioner).

³²⁰ Johnson's Administrator v. Longmire, 39 Ala. 143 (1863); Walworth v. Abel, 52 Pa. St. 370 (1866); McLean's Executors v. Wade, 53 Pa. St. 146 (1866); Weaver v. Roth, 105 Pa. St. 408 (1884); Needham v. Gillett, 39 Mich. 574 (1878); Woodhouse v. Phelps, 51 Conn. 521 (1884); Vail v. Anderson, 61 Minn. 552, 64 N. W. 47 (1895); Richardson v. Cole, 160 Mo. 372, 61 S. W. 182 (1901); Moore v. Brandenburg, 248 Ill. 232, 93 N. E. 733 (1910).

will probably be agreed that such actions should not be allowed as a matter of general policy unless all debts have been paid or the estate is not subject to them. Suppose, however, that it is proved to the satisfaction of the court that all debts have been paid. May recovery be permitted? A negative answer has been given in most cases³²¹ on the theory that the decedent's creditors, if any, are not parties to the action and that the non-existence of debts can only be judicially determined by an official administration. As was said in one case, "One of the purposes of administration is the payment of the debts of the deceased and the barring of claims against the estate. A mere statement or affidavit that there are no such claims cannot establish that fact. Such fact can only be judicially established by due course of administration."³²²

Such decisions are predicated upon three implicit assumptions. First, it is said that the heirs cannot know or prove with absolute certainty whether the decedent was indebted or not. But absolute proof of a fact is seldom, if ever, required. Why should it be required in actions of this kind? Something less than absolute verity could well be accepted here. Should it always be assumed that the decedent's family never know of his financial affairs? In proceedings for the summary administration of estates or for an order of "no administration" their word is accepted by the probate court as a basis for action. Second, it is said that if payment is required of a debtor or if payment is voluntarily made by him, he would also be liable to a subsequently appointed administrator.

³²¹ *Sowle v. Potter*, 223 Ky. 136, 3 S. W. (2d) 174 (1928); *Brobst v. Brobst*, 190 Mich. 63, 155 N. W. 734 (1916); *Weis v. Kundert*, 172 Minn. 274, 215 N. W. 176 (1927); *Champollion v. Corbin*, 71 N. H. 78, 51 A. 674 (1901); *McBride v. Vance*, 73 Ohio St. 258, 76 N. E. 938 (1906); *Mears v. Smith*, 19 S. D. 79, 102 N. W. 295 (1905); *In re Collins' Estate*, 102 Wash. 697, 173 P. 1016 (1918); *McKenney v. Minahan*, 119 Wis. 651, 97 N. W. 489 (1903). In general, see 2 WOERNER, ADMINISTRATION (3d ed. 1923) § 200.

³²² *State ex rel. Mann v. Superior Court*, 52 Wash. 149 at 152, 100 P. 198 (1909).

This oft-repeated statement has just enough truth in it to justify caution in allowing recovery or to justify a debtor in refusing payment voluntarily. But it will be shown later that the actual cases do not support this statement as a general proposition. If payment is made, courts will go to unusual lengths to relieve the debtor from making a second payment. Third, it is assumed that the payment of money to the heirs will result in its immediate dissipation by them and that recovery of it from them by a subsequently appointed administrator would be impossible. It is never assumed that the heirs might apply it to the payment of claims, particularly to funeral expenses or other preferred claims. Insolvency or dishonesty on the part of heirs is too readily assumed. Why not assume that money or property in their hands would be as safe there as in the hands of the third person? These are the arguments advanced to deny recovery by the heirs. They are not without some weight. Their validity, however, as expressions of human conduct may be open to some question as a basis for an absolute rule of law.

More courageous courts have seen fit to depart from this strict rule and have permitted the heirs to show, by whatever evidence available to them, that there are no creditors with outstanding claims at the time of trial or that the assets of the estate would not be subject thereto. Recovery from debtors is permitted upon such proof.³²³ The functions of a personal representative, if appointed, would be purely formal and perfunctory, it is said, and would serve no useful purpose. Under such circumstances the only office of administration would be to

³²³ *Cooper v. Davison*, 86 Ala. 367, 5 So. 650 (1888); *Braun v. Pettyjohn*, 176 Ala. 592, 58 So. 907 (1912); *Metropolitan Life Ins. Co. v. Fitzgerald*, 137 Ark. 366, 209 S. W. 77 (1919); *Business Men's Accident Ass'n v. Green*, 147 Ark. 199, 227 S. W. 388 (1921); *Bathey v. Meyerhardt*, 157 Ga. 800, 122 S. E. 195 (1924); *Moore v. Brandenburg*, 248 Ill. 232, 93 N. E. 733 (1910) (lack of indebtedness admitted by demurrer); *Merchants' National Bank of Muncie v. McClellan*, 40 Ind. App. 1, 80 N. E. 854 (1907); in general, see 2 WOERNER, ADMINISTRATION (3d ed. 1923) § 201; 70 A. L. R. 386 at 389-393.

make distribution, and this may be accomplished equally well in an action to recover assets. Such a rule is found to be in particular favor in Alabama and Mississippi where courts of equity have traditionally administered estates.³²⁴ Courts of other states, however, have not hesitated to allow similar actions, even though not instituted in equity.

Even courts which ordinarily refuse recovery from debtors generally permit it under special circumstances. For example, recovery has been permitted when the decedent was a minor³²⁵ or insane person³²⁶ and presumably incapable of contracting debts. Occasional cases have said that the non-existence of creditors will be presumed from the mere lapse of time without administration having been had.³²⁷ Of course, the lapse of time required by various statutes for the barring of claims when no administration is sought, will serve equally well as a sufficient basis for allowing recovery.³²⁸ Where a formal administration has proceeded beyond the nonclaim period, recovery by the heirs has sometimes been permitted.³²⁹

³²⁴ See cases from those states cited in note 323, *supra*. In *Weiland v. Weiland*, 297 Ill. App. 239, 17 N. E. (2d) 625 (1938) it was mentioned that although this was originally the rule in equity it would be applied in law as well.

³²⁵ *Vanzant v. Morris*, 25 Ala. 285 (1854); *Graves v. Davenport*, 45 Colo. 270, 100 P. 429 (1909); *Lynch v. Rotan*, 39 Ill. 14 (1865); *McCleary v. Menke*, 109 Ill. 294 (1884); *Hargroves v. Thompson*, 31 Miss. 211 (1856) (two months' old child); *Cobb v. Brown*, Speers (S. C. Eq.) 564 (1844). In *Cobb v. Brown*, *supra*, it was said that this exception dispensing with administration on estates of deceased infants may be going too far "because even infants may be liable for necessities."

³²⁶ *Drummond v. Hardaway*, 21 Ga. 433 (1856).

³²⁷ *Jones v. Brevard*, 59 Ala. 499 (1877); *Anderson v. Smith* (Ky. 1861), 3 Met. 491 (twenty-eight years); *Richardson v. Cole*, 160 Mo. 372, 61 S. W. 182 (1901) (twelve years); *McDowell v. Orphan School*, 87 Mo. App. 386 (1901); *McLean's Ex'rs v. Wade*, 53 Pa. St. 146 (1866); *Dixon v. Roessler*, 76 S. C. 415, 57 S. E. 203 (1906); *Duncan v. Veal*, 49 Tex. 603 (1878) (fourteen years); *Mott v. Riddell* (Tex. 1880) 2 Posey, Unrep. Cas. 107; *Hill v. Young*, 7 Wash. 33, 34 P. 144 (1893) (eight years); *Murphy v. Murphy*, 42 Wash. 142, 84 P. 646 (1906); *State ex rel. Speckart v. Superior Court*, 48 Wash. 141, 92 P. 942 (1907); *Duvall v. Healy Lumber Co.*, 57 Wash. 446, 107 P. 357, *aff'd on rehearing*, 57 Wash. 452, 109 P. 305 (1910) (thirteen years); In re *Peterson's Estate*, 137 Wash. 137, 241 P. 964 (1926) (twenty-seven years).

³²⁸ See notes 289 to 319, *supra*.

³²⁹ *Powell v. Pennock*, 181 Mich. 588, 148 N. W. 430 (1914).

But this seems an unsound practice, for it has the effect of a partial distribution in an official administration without satisfying the ordinary requirements therefor. As long as administration has been started, the better practice would seem to be to require its completion before permitting final or partial distribution by a process of a direct collection by the heirs.

As a basis for denying recovery in a direct action by the heirs, the argument is frequently made that the debtor might be called upon to pay a personal representative who might be appointed subsequently. This argument is employed not only by courts in formulating or applying a rule of policy, but it is also constantly reiterated by debtors of the decedent who are requested by heirs to make voluntary payment to them. The comment made by the Supreme Court of Mississippi on this subject is pertinent here:

“If a presumption may be indulged that creditors are barred, or if a reasonable time has elapsed since the death of decedent to give creditors a full opportunity to open on administration, . . . and they have failed to do so, a stranger, who is called to an account at the suit of the distributees, ought not to be permitted to defeat a recovery, for the reason that there are or may be outstanding debts. A recovery by them does not cut off creditors or put them in a worse predicament than they were before. . . . After so long a time, with no steps taken by the creditors to take out letters, or otherwise move toward its collection, it would be inequitable to permit . . . defendant to set up the right which this stale creditor may or may not have, might or might not assert, to cut off the right of the distributee.”³⁸⁰

However, where payment has been made voluntarily to the heirs, where no creditors appear or demand administration, and where a personal representative is later appointed who brings an action on the debt, courts have seldom hesitated

³⁸⁰ *Ricks v. Hilliard*, 45 Miss. 359 at 363-364 (1871).

to deny a second recovery.³³¹ For example, in *Molendorp v. First National Bank of Sibley*,³³² a decedent by his will left all of his estate to his wife. A son was later appointed administrator with the will annexed and sought recovery of a bank deposit which had previously been paid to the widow, although she had not taken out administration. There were ample funds in the estate to pay all debts. In denying the right of the administrator to make a second collection of the deposit from the bank, the court said:

"The one chief purpose of administration upon an estate is to collect the assets, apply the same to the payment of all proper charges and expenses, and turn the remainder over to the heirs or legatees entitled thereto. For this purpose, it is true that the legal title to the assets is in the administrator, and, in strict regularity, one who is indebted to the estate should make payment to him; but if, instead of so doing, the debtor, acting in good faith, should, by mistake of law or fact, make payment direct to the person who would be entitled to receive it through the administrator, and the money is not needed or required by the administrator for the payment of claims or expenses, the end of the law is accomplished, and it would be little less than ridiculous to hold the debtor liable to pay his debt over again. . . . The law requires no vain things. When the deposit was paid to the widow, the money reached the hands of her who was vested with the ultimate right to receive it; and, as no part of it was required to meet or defray the needs of administration, no one was in any manner injured or wronged by the 'short circuiting' of the deposit from the bank to the widow, instead of passing it through the hands of the administrator."

³³¹ *Van Meter v. Illinois Merchants Trust Co.*, 239 Ill. App. 618 (1926); *Christe v. Chicago, R. I. & P. Ry.*, 104 Iowa 707, 74 N. W. 697 (1898); *Molendorp v. First National Bank of Sibley*, 183 Iowa 174, 166 N. W. 733 (1918); *Bell v. Farmers' & Traders' Bank*, 188 Mo. App. 383, 174 S. W. 196 (1915); *Northern Trust Co. v. Travelers Ins. Co. of Hartford, Conn.*, 329 Pa. 17, 196 A. 497 (1938); *McKeigue v. Chicago & Northwestern Ry.*, 130 Wis. 543, 110 N. W. 384, 11 L. R. A. (N. S.) 148 (1907).

³³² 183 Iowa 174 at 176, 166 N. W. 733 (1918).

The risk entailed in paying out money to those persons apparently entitled to it can be reduced to a minimum by applying it or by seeing that it is applied to the payment of funeral expenses and other preferred claims. If a personal representative is subsequently appointed, the debtor is subrogated to the right of the preferred claimant to whom the payment has been made and thus freed from any further liability to the estate.³³³ Thus in *Van Meter v. Illinois Merchants Trust Co.*,³³⁴ a decedent left \$355 on deposit in a Chicago bank. At the instance of a sister the deposit was applied in payment of the funeral expenses amounting to some \$367. Subsequently the public administrator applied for and was granted letters and attempted to make a second collection of the deposit. In denying recovery and saying that administration should not be granted merely for the sake of administration, the court said:

"It is stated in defendant's brief that it is a long-established and well-known custom among Chicago banks generally, voluntarily to pay over, without administration, small balances to either the undertaker or heirs of depositors reported dead upon being furnished with proper affidavit, inheritance tax release, receipted funeral bills, and an undertaker's assignment. Such a custom, especially where the heirs consent, would seem to be desirable and commendable and should not be disturbed by officious intermeddling for the sake of possible administration fees."

In small estates also where there are but a few debts owing to a decedent and these small in amount, the practice of requiring formal administration seems an unnecessary burden imposed upon the decedent's family. Ordinarily, such debts include nothing more than small bank accounts, wage or in-

³³³ *Van Meter v. Illinois Merchants Trust Co.*, 239 Ill. App. 618 (1926); *Goldsmith v. Buffalo Savings Bank*, 156 Misc. 889, 282 N. Y. S. 783 (1935).

³³⁴ 239 Ill. App. 618 (1926).

surance claims, all of which would ordinarily not be more than sufficient to pay funeral expenses and perhaps a small family allowance. Often they are less than the amount to which the surviving family is entitled as exempt property.

Under such circumstances, methods should be available to permit collection of these assets by the surviving family or other relatives, irrespective of the existence of debts against the estate. Administration could only decrease the net amount available to them and prolong the time of its realization. An historical survey of existing legislation reveals that numerous statutes have been passed, particularly during the last decade, authorizing the payment of small bank accounts,³³⁵ wage claims,³³⁶ savings and loan shares³³⁷ and proceeds of insurance policies³³⁸ to designated surviving members of the decedent's

³³⁵ Ariz. Code (1939) § 51-515 (\$500); Cal. Prob. Code Ann. (Deering, 1944) § 630.5 (\$500); Conn. Gen. Stat. (1930) § 4970 (amended by Supp. 1943, § 671g) (\$500); Del. Rev. Code (1935) § 3846 (\$75); Ga. Code Ann. (Supp. 1943) § 13-2048 (\$600); Idaho Laws Ann. (1943) § 15-1406 (\$300); Ind. Stat. (Burns, Supp. 1943) § 6-1515 (\$100); Mass. Ann. Laws (Supp. 1944) c. 167, § 31A (\$500 in bank liquidations); Miss. Code (1942) § 5205 (\$300); N. J. Stat. Ann. (1937) § 3:7-8 (\$200); N. M. Stat. (Supp. 1945) § 33-1307 (\$300); N. Y. Banking Law, art. 6, § 239(4) (\$500); Ore. Comp. Laws (1940) § 40-1004 (\$500); Utah Code (1943) § 7-3-49 (\$300); Va. Code (1942) § 4149(34) (\$300); Wash. Rev. Stat. (Supp. 1943) §§ 3249-1 and 3249-2 (\$500).

³³⁶ Ala. Code (1940) t. 7, § 666 (\$100); Ariz. Code (1939) § 38-2003 (\$300); Cal. Prob. Code Ann. (Deering, 1944) § 630 (\$1,000); Conn. Gen. Stat. (1930) § 4970 (amended by Supp. 1943, § 671g) (\$500); Del. Rev. Code (1935) § 3845 (\$75); Fla. Stat. Ann. (1941) §§ 222.15 and 222.16 (any wages and traveling expenses, up to \$300); Ga. Code Ann. (1937) § 66-103 (\$300); Ind. Stat. (Burns, Supp. 1943) § 6-1514 (\$150); Minn. Stat. (1941) § 181.58 (\$200); Miss. Code (1942) §§ 653 to 656 (\$300); N. J. Stat. Ann. (1937) § 3:7-8 (\$200); N. M. Stat. (Supp. 1945) §§ 33-1305 and 33-1306 (\$300); N. Y. Dec. Est. Law, § 103-a (\$150); N. D. Rev. Code (1943) § 34-0112 (\$400); Ohio Gen. Code (Page, Supp. 1943) § 10509-5a (\$150); Ore. Comp. Laws (Supp. 1943) §§ 91-1005, 102-607a (\$200); Pa. Stat. Ann. (Purdon, 1930) t. 20, § 867 (\$150); Utah Code (Supp. 1945) § 102-8-3 (\$300); Va. Code (1942) § 5278a1 (\$300); Wash. Rev. Stat. (Supp. 1940) §§ 1464-1, 1464-2 (\$300); Wis. Stat. (1943) § 103.39 (any amount).

³³⁷ Conn. Gen. Stat. (1930) § 4970; Ore. Comp. Laws (Supp. 1943) §§ 41-614 to 41-616.

³³⁸ Conn. Gen. Stat. (1930) § 4970 (\$500); Kan. Gen. Stat. (Supp. 1943) § 40-258 (\$1,000); N. D. Rev. Code (1943) § 65-0527 (\$80 workmen's compensation insurance); Utah Code (Supp. 1945) § 102-8-3 (\$300).

family. These statutes vary considerably in the kind of debts and property to which they apply and the amount or value which they permit to be paid without administration. All of them represent wholesome legislation although the maximum amounts of money provided in many of them are often appallingly small. For example, the amount of wages which may be paid to a surviving widow under such a statute must not exceed \$75 in Delaware, \$100 in Alabama, and \$150 in Indiana, New York, Ohio and Pennsylvania. The Connecticut statute is more liberal, allowing up to \$500, and the Wisconsin statute does not limit the amount. Corresponding variations exist in the amounts of bank deposits thus payable.

The singling out of particular kinds of property or debts for allowing payment direct to the heirs seems an unsound practice. Much of it appears to be banking or employer legislation, rather than probate legislation. A better method is not to restrict the payment of such claims to a particular type of property such as bank deposits or wages, but to permit the payment, delivery or transfer of any kind of debt or property where the total amount of the estate does not exceed a stated sum. This has been done in California,³³⁹ Florida,³⁴⁰ Illinois,³⁴¹ Montana,³⁴² New Jersey,³⁴³ North Carolina,³⁴⁴ South Carolina³⁴⁵ and Virginia.³⁴⁶ In New Jersey, however, the amount thus payable must not exceed \$200. A more liberal sum is allowed in California and Illinois where a maximum of \$1,000 may be paid, transferred or delivered.

³³⁹ Cal. Prob. Code Ann. (Deering, 1944) §§ 630, 631, 631.1 (\$1,000).

³⁴⁰ Fla. Stat. Ann. (Supp. 1945) §§ 735.01 to 735.09 (\$2,000).

³⁴¹ Ill. Ann. Stat. (Smith-Hurd, 1941 and Supp. 1945) c. 3, §§ 478, 481, 482 (\$1,000).

³⁴² Mont. Rev. Code (1935) § 10012 (\$500).

³⁴³ N. J. Stat. Ann. (1937) § 3:7-8 (\$200).

³⁴⁴ N. C. Rev. Stat. (1943) § 28-68 (\$300).

³⁴⁵ S. C. Code (1942) § 9028 (\$500).

³⁴⁶ Va. Code (1942) § 6143a (\$500).

The sum thus payable under the California statute is not considered exempt property, however. It is payable to a surviving spouse or other relative as a temporary expedient with the expectation that it will be applied to the payment of funeral expenses and used as a kind of family allowance. If administration is later granted, then the person receiving such funds must account for them to the personal representative. In *Brezzo v. Branger*,³⁴⁷ the California Court of Appeals said that such collection does not give a surviving spouse title to the fund but that "the purpose of legislation . . . was to provide the family of the deceased with temporary funds for such immediate necessities as funeral expenses, and perhaps to provide ready money for their support pending the probate of their estate. This being so, the husband . . . was entitled to withdraw the funds from the bank, but this did not give the husband title to the fund, that is to say, it was not intended by the provisions of the section that the fund should become the property of the husband." On the contrary, it must be accounted for or paid over to the personal representative, if one is later appointed. It seems probable, however, that in the great majority of small estates no administration would later be granted, and that the collection and application of the money by the surviving spouse or other relative would never be questioned or disturbed.

The procedure contemplated by the statutes of California, Illinois and New Jersey is for some member of the family to present an affidavit to the debtor to the effect that the total amount of the decedent's estate does not exceed the statutory amount. The debtor is thereupon entitled to accept and rely upon the facts stated in the affidavit. This appears to be a highly desirable way of permitting the collection of small

³⁴⁷ 51 Cal. App. 79 at 81, 196 P. 87 (1921). The Washington statute is explicit on this point. See Wash. Rev. Stat. (Supp. 1943) §§ 3249-1 and 3249-2.

estates without resort to some judicial procedure. It provides a simple and inexpensive method of administration for a small estate, and at the same time it provides adequate and complete protection to a debtor who is willing to make payment. The Illinois Act, said Professor Freund at the time of its enactment in 1927, "legalizes a practice which it is understood has in the past been indulged in to some extent by institutions at their own risk."³⁴⁸

These statutes vary in another respect. Some are obligatory upon the debtor while others are only permissive. The Indiana statutes, for example, provide that "It shall be lawful for any employer" to pay wages or earnings owing to a decedent to the surviving spouse, children over the age of eighteen years, or certain other relatives. It is further provided that "The payment of such wages or personal earnings shall be a full discharge and release to the employer." Corresponding provisions exist for the payment of bank deposits. Such statutes are to be contrasted with the Illinois statutes which provide that "Upon receiving an affidavit that a resident of this state died leaving personal estate not exceeding one thousand dollars in value, that no letters are then outstanding on the estate in this state, that no petition for letters on the estate is pending in this state, that all funeral expenses of the decedent have been paid, that thirty days have elapsed since the death of the decedent and that the affiant has knowledge of the facts, any person or corporation indebted to or holding personal estate of the decedent may pay the indebtedness or deliver the personal estate" to certain designated members of the decedent's family. This statute, standing alone, is purely voluntary as is the Indiana statute. A companion Illinois statute provides, however, that if such person or corporation to whom the affidavit is delivered refuses to pay, deliver or

³⁴⁸ Freund, "The Product of the Fifty Fifth General Assembly," 22 ILL. L. REV. 473 at 475 (1928).

transfer the personal estate, "it may be recovered in a civil action by or on behalf of the person entitled to receive it upon proof of the facts required to be stated in the affidavit." It is also provided that "For the purpose of the action the affidavit is prima facie proof of the facts stated therein." Such a statute has the advantage of permitting a recovery of property without taking out administration where the heirs are actually entitled to it. It is not only permissive in character, but it also permits direct action to be brought to recover money or property where the amount is sufficiently small as not to justify formal administration. Whether payment or delivery is made by the third party voluntarily or pursuant to a judgment rendered in an action by the heirs, such third party is adequately protected and becomes fully discharged of his obligation to the estate of the decedent. Whether the estate actually exceeds the statutory amount does not affect the debtor's discharge. He is entitled to rely upon and have the benefit of the recitals contained in the affidavit. Similar provisions of this latter kind exist also in the California and New Jersey statutes. Another desirable feature of the Illinois statute is that it requires a thirty-day waiting period before such payment or delivery may be made. If there are outstanding creditors and the family has not applied for administration, the creditors would doubtless have taken action by this time. Such a requirement operates as a practical protection to creditors by affording them a reasonable opportunity to apply for administration during this period.

A further difference in these statutes authorizing the collection of wages, bank deposits and the like, concerns the stated maximum amount. In California, Connecticut, Florida, Illinois and New Jersey, the entire estate, including the bank deposits, wages and all other property must not, in the aggregate, exceed the amount specified in the statute. On the other hand, the statutes of Arizona, Georgia, Indiana, New

Mexico, New York, Oregon, Utah and Washington treat each item separately. As a result, it is possible in any of these latter states for the family of the decedent to collect bank deposits, wages, insurance and building and loan shares each in the maximum amount stated in the statute. This selection of different kinds of property as a basis for allowing recovery by the heirs seems unjustified in view of the primary purpose of these statutes. The total amount of the estate, not the separate amounts of different kinds of property, should be the basis for their application.

3. *Distribution of residue*

Assuming that neither heirs nor creditors have demanded administration or that they have been successfully resisted, and that the heirs have been able to make a full collection of all assets belonging to the estate, the next question concerns the efficacy of distribution and partition of the assets of the estate among the heirs. With the property in their possession there might seem to be no obstacle to its distribution as long as all of the parties in interest are sui juris and have reached an agreement as to its division. So long as no one is adversely affected by such a family settlement, such a procedure is a commendable one. It relieves the burden of the courts, it promotes good feeling among the heirs, and it returns property to commerce sooner than would ordinarily be possible by the processes of an administration proceeding.

The solution of the problem, however, is not always possible, or as simple as above stated. As indicated, three conditions must exist: the absence of creditors with existing claims, the legal capacity of all heirs who are entitled to share in the estate, and their agreement as to how the property is to be distributed. It is assumed that there is a participation by all heirs and that no question exists as to their identity or relation-

ship. Only in relatively rare cases³⁴⁹ is there likely to be any difficulty as to who is entitled to the estate under the statute of descent and distribution, or under any agreement which the parties may enter into. It is entirely possible also that the nature of the property interests involved is so complex, or the rights of the parties so various, that a division may be impracticable if an attempt is made to distribute according to the statute; but, of course, there is no requirement that they make division in that precise manner. Any agreement among the heirs, fairly entered into, will be given full effect as between all persons bound by it. Any attempt by an heir to withdraw or repudiate such an agreement by seeking the appointment of a personal representative will ordinarily meet with failure.³⁵⁰ To permit an administrator so appointed to recover property from the heirs, only to redistribute it to them later, would be utterly futile.

4. *Effectiveness of distribution as conferring marketable title*

Another aspect of this problem arises when the assets of the estate consist of land, registered securities or other property the title to which is registered. The heirs may be in perfect accord as to its division and distribution. They may even make division and distribution among themselves. In this connection two matters need consideration, one presently, the other prospectively. For registered securities or other similar property immediate transfer will usually be desired. The heirs will ordinarily have physical possession of such securities

³⁴⁹ See, for example, *Bennett v. Morris*, 111 Ill. App. 150 (1903) where an agreement between the widow and heirs to distribute the estate became impossible to carry out and the court thereupon granted administration and ordered distribution made as though no such agreement had been made.

³⁵⁰ *Richardson v. Cole*, 160 Mo. 372, 61 S. W. 182 (1901); *Estes v. Estes* (Mo. 1942) 166 S. W. (2d) 1061. In general, see 2 WOERNER, ADMINISTRATION (3d ed. 1923) 663.

or property but the transfer agent or public officer must be satisfied of the validity and effectiveness of such a family settlement to justify his transfer to those persons entitled to succeed to their ownership. This means compliance with the three conditions already enumerated. An examination of existing legislation discloses several statutes, most of them recently enacted, designed to provide for the transfer of such registered property without the necessity of formal administration.

As to registered securities and stock in a corporation, the statutes of California³⁵¹ and Illinois³⁵² are specific in authorizing their transfer upon the furnishing to the corporation or transfer agent of an affidavit of the same kind as is required for the payment of money or the delivery of property where no administration has been had. This would probably also be true under the New Jersey statutes,³⁵³ although it is not explicitly declared. In the absence of such legislation, there are those occasional instances in which corporations or transfer agents do make transfers of registered securities and stock upon evidence satisfactory to them that the transferee is entitled thereto and that there is no outstanding indebtedness.

As to automobiles for which certificates of title are now generally issued, a similar problem is presented. The public official, whose duty it is to issue a new certificate of title in place of the old one issued in the name of the decedent, ordinarily relies upon an order of transfer or decree of distribution made by the probate court having jurisdiction over the decedent's estate. In the absence of administration the transfer of the family car involves much the same problem as payment of wages or bank deposits. Within the past decade statutes have been adopted in California,³⁵⁴ Maryland,³⁵⁵ Michigan,³⁵⁶

³⁵¹ Cal. Prob. Code Ann. (Deering, 1944) §§ 630, 631, 631.1.

³⁵² Ill. Ann. Stat. (Smith-Hurd, 1941 and Supp. 1945) c. 3, §§ 478, 481, 482.

³⁵³ N. J. Stat. Ann. (1937) § 3:7-8.

³⁵⁴ Cal. Vehicle Code (Deering, 1943) § 185 (\$1,000).

³⁵⁵ Md. Code (Supp. 1943) art. 93, § 243A (amended by Md. Laws 1945, c. 35). By art. 93, § 243B, added by Md. Laws 1945, c. 466, the certificate of

Montana,³⁵⁷ Utah,³⁵⁸ Virginia³⁵⁹ and Wyoming³⁶⁰ authorizing the transfer of a registered title to motor vehicles when their value is less than a stated amount, upon presentation of an affidavit showing the value of the estate left by the decedent and the right of the person seeking the transfer.³⁶¹

As to land, the heirs may make immediate partition or division among themselves by an exchange of deeds. There is no transfer agent or public officer to question the validity of such a procedure. And the respective heirs may continue to possess and enjoy the property so allotted to them. Only upon a future sale by the heirs to some third party will the subject of the validity of the family settlement be presented. This future purchaser will want to know that the land is not subject to claims against the decedent and that those who participated in the settlement constituted all the heirs of the decedent. In some few states the bar of creditors may not be possible in the absence of administration, but statutes of the kind already discussed³⁶² may be determinative of the question.

As earlier indicated, a separate determination and assessment of inheritance taxes may be had in most states where no official administration is had. Such proceedings will afford the basis for a clearance of the state's lien. And in a substantial number of states there are statutes³⁶³ which bar the state in the assertion of its tax lien after the lapse of a period of time

registration of a boat or vessel not exceeding \$500 in value may likewise be transferred.

³⁵⁶ Mich. Stat. Ann. (1937) § 9.1474 (\$500).

³⁵⁷ Mont. Laws 1943, c. 148, § 2(e) (\$1,000).

³⁵⁸ Utah Code (1943) § 57-3a-70 (\$1,000).

³⁵⁹ Va. Code (Supp. 1944) § 2154(74) (f) (when automobile is only personal property belonging to decedent and his debts have been paid or will be paid out of proceeds of sale of motor vehicle).

³⁶⁰ Wyo. Laws 1945, c. 112 (when there is no other property necessitating administration and there are no unpaid debts; and after creditors have been given twenty days' notice).

³⁶¹ In general see comment, "A Comparison of Land and Motor Vehicle Registration," 48 YALE L. J. 1238 (1939).

³⁶² See notes 289 to 319, *supra*.

³⁶³ See note 319, *supra*.

without administration and without any action having been taken by the state to make collection.

The determination of heirship alone remains. In some states there is an official and conclusive determination of heirship in an administration proceeding.³⁶⁴ Elsewhere, where the land passes directly to the heirs and the personal representative obtains no jurisdiction over it unless needed for the payment of debts, an affidavit is employed or the heirship is inferred from the record or from recitals in a conveyance from the heirs.³⁶⁵ The absence of administration does not affect the problem of determining heirship except in those states where there is an official determination of heirship in connection with the administration proceeding or as a part of the decree of final distribution. And, of course, where it is inferred in some manner from the record in the administration proceedings, some substitute is needed when no administration is had.

Where an affidavit or a recital in a deed from the heirs is customarily employed to prove heirship and is accepted as a basis for marketable title, the same procedure should be followed where no administration has been had. But when a decree of heirship in an administration proceeding is customarily relied on, obviously some substitute for it will be necessary here. In several states statutes³⁶⁶ have accordingly

³⁶⁴ 3 WOERNER, ADMINISTRATION (3d ed. 1923) § 561; 3 BANCROFT'S PROBATE PRACTICE (1928) § 1147.

³⁶⁵ PATTON, LAND TITLES (1938) § 288.

³⁶⁶ Colo. Stat. (1935 and Supp. 1944) c. 176, §§ 28-34; Fla. Stat. Ann. (1941) § 734.25; Idaho Laws Ann. (1943) §§ 15-1401 to 15-1405; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 209-210; Kan. Gen. Stat. (Supp. 1943) §§ 59-2250 to 59-2252; Mich. Stat. Ann. (1943) §§ 27.3178(145) to 27.3178(149); Minn. Stat. (1941) §§ 525.31, 525.311, 525.312; Miss. Code (1942) §§ 1270-1272; Neb. Rev. Stat. (1943) §§ 30-1701 to 30-1708; N. J. Stat. Ann. (1937) § 3:4-1 to 3:4-3; N. M. Stat. (1941) §§ 33-1213 to 33-1218; N. Y. Surr. Ct. Act, §§ 311 to 313; N. D. Rev. Code (1943) §§ 30-2201 to 30-2213; Okla. Stat. (1941) t. 84, §§ 251-261; Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3590 to 3597a; Utah Code (1943) §§ 102-12-34 to 102-12-35; W. Va. Code (1943) § 4088; Wis. Stat. (1943) §§ 237.09, 315.02-315.06; Wyo. Rev. Stat. (1931) §§ 88-4101 to 88-4103 (amended Laws 1945, c. 79).

been passed providing for a summary determination of heirship where there has been no administration proceeding. Some of these statutes purport to make the determination conclusive in the same manner as a similar decree made in connection with an administration proceeding. Usually, however, decrees of heirship have only *prima facie* effect as to their correctness. Despite this shortcoming, they do have some value and are readily accepted as evidence of heirship by title examiners.

Special statutes have been enacted in Idaho,³⁶⁷ Nebraska³⁶⁸ and New Mexico³⁶⁹ providing that where a certain period has elapsed since the death of a person owning real property in such state, and upon whose estate no administration has been had or applied for, the heirs of the decedent or other person having an interest in said real property, may file a petition in the probate court and ask for a determination of heirship. After notice by publication, the court makes an official determination of heirship which has the same effect as a decree of final distribution in those states where such a decree is regarded as having full effect with respect to the decedent's property. Under the Idaho statute, if a creditor appears and presents a claim, then the court must grant administration in the usual manner; otherwise the decree of heirship is final. Under the Nebraska and New Mexico statutes, however, no such permission is given for creditors to present their claims, for the reason that their claims, insofar as land of the decedent is concerned, have ceased to be a lien thereon. Since there is no such statute in Idaho barring claims after the lapse of two years when there has been no administration, it is only proper that creditors be given the right to present their claims in connection with such a proceeding and ask for administration in the usual manner. Being afforded such an opportunity,

³⁶⁷ Idaho Laws. Ann. (1943) §§ 15-1401 to 15-1405.

³⁶⁸ Neb. Rev. Stat. (1943) §§ 30-1705 to 30-1708.

³⁶⁹ N. M. Stat. (1941) §§ 33-1213 to 33-1218.

creditors are not deprived of any right without due process of law.

E. DISPENSING WITH ANCILLARY ADMINISTRATION ³⁷⁰

When a decedent dies owning property in states other than that of his domicile, it is conceivable that one administration upon his estate would suffice. The domiciliary representative would need powers to collect assets throughout all the states; and local creditors in each state would be required to come to the state of domicile where administration is being had to present their claims. The law has not developed in this fashion, however. The orthodox view is that, in the absence of statute, the powers of a personal representative cease at the borders of the state which appointed him. And other states in which the decedent's property may be located have sometimes insisted on local administration in order to simplify the problem for the decedent's creditors residing there. The phenomenon of ancillary administration has resulted.

Assuming that domiciliary administration is had on the estate of a decedent, to what extent may the requirements of administration be dispensed with in a second state in which assets are located? The answer to this question will depend on two factors: (1) how far the second state will give recognition to the appointment and powers of the personal representative of the state of domicile; and (2) to what degree and for what duration it desires to protect local creditors by making assets located there available to their claims.

If a personal representative could make physical collection of assets located in states other than that of his appointment,

³⁷⁰ For an extended consideration and analysis of the problems here considered from the point of view of conflict of laws, two studies should be mentioned: Buchanan and Myers, "The Administration of Intangibles in View of First National Bank v. Maine," 48 HARV. L. REV. 911 (1935); Hopkins, "Conflict of Laws in Administration of Decedents' Intangibles," 28 IOWA L. REV. 422 (1943).

administration would then, as a practical matter, be confined to that state. This is a practical possibility only if debtors and persons in another jurisdiction are willing to make payment, or deliver property voluntarily to the personal representative, or are under a legal obligation to do so. The conflict of laws rules of such jurisdiction thus become the determining factor in the solution of the whole problem of dispensing with ancillary administration.

If the domiciliary representative be regarded as succeeding to the "title" to all property of the decedent, irrespective of its location, it would seem to follow that extraterritorial recognition should be given to his rights and powers. Unification of administration on decedents' estates would be the rule rather than the exception. Opposing this view is the theory which confines the official personality of the personal representative to the state of his appointment. Multiplication of administrations is the result of this latter view. Despite the existence of both of these theories it would be untrue to say that any state recognizes one to the complete exclusion of the other. Often both theories have undergone a measure of contemporaneous development in the same jurisdiction.

As will be shown in the discussion that follows, the protection of local creditors has been the primary argument for denying to foreign domiciliary representatives the right to collect assets or to maintain an action therefor. This alleged reason of policy, it is submitted, has little or no basis in fact in the great majority of estates. The resulting requirement of ancillary administration leads only to a wasteful expenditure of time, effort and expense. It is time to re-examine the question whether the alternative of requiring all creditors to file their claims in the domiciliary administration would not be a more desirable solution from every point of view.

Despite the risks involved in making payments or delivering property to foreign domiciliary personal representatives

in the absence of statutory authority, the fact is that many debtors and persons having possession of property take such risks and make payments or deliver property to the foreign administrator. It is seldom that such persons are called upon to account again to a local administrator. The problem involved is similar to that which arises when a debtor of a decedent makes payment direct to the heirs when no personal representative has been appointed and administration is not contemplated.

I. *Voluntary payment to foreign personal representatives*

Behind such cases as *Crohn v. Clay County State Bank*,³⁷¹ in which a Missouri debtor was held not discharged in making voluntary payment to an Iowa administrator, lies a policy of protecting local creditors. Such a result is often explained by saying that the legal personality of the administrator does not extend beyond the borders of the state from which he derives his authority. While there is a logical basis for such a view, the alleged protection of local creditors is more often a myth than a reality. An early decision of the Supreme Court of the United States, *Wilkins v. Ellett*,³⁷² gave momentum to a contrary view when it held that voluntary payment by a debtor to a foreign administrator was a valid discharge of the debt. Reference was made in the opinion to the doctrine of *mobilia sequuntur personam*. This time-worn rule, so often of late disregarded in matters of taxation, was thought to be socially serviceable in that situation. Fortunately this decision has influenced others and today its rule serves as the controlling guide in most states.³⁷³

It should be said, however, that most of the decisions which have upheld voluntary payments to a foreign administrator

³⁷¹ 137 Mo. App. 712, 118 S. W. 498 (1909).

³⁷² 9 Wall. (76 U. S.) 740 (1869).

³⁷³ 3 BEALE, CONFLICT OF LAWS (1935) 1472; GOODRICH, CONFLICT OF LAWS (2d ed. 1938) § 183; Beale, "Voluntary Payment to a Foreign Administrator," 42 HARV. L. REV. 597 (1929).

have been those in which creditors did not exist or did not assert their rights in the state where payment was being made. When creditors do exist or when an ancillary personal representative has been appointed, it may be arguable that a contrary decision would be justified. In either of these events, two other inquiries become pertinent. First, the existence of local creditors may not be known to the debtor; indeed, it is often said that local administration is a prerequisite to the determination of the existence or absence of creditors. Second, the appointment of a local ancillary administrator may not be known, especially since the venue for administration on the estate of a non-resident decedent may be the result of a wide choice on the part of those applying for it.³⁷⁴ The New York Court of Appeals remarked in one case³⁷⁵ that to require that there be no local administrator as a prerequisite for discharging a debtor who made voluntary payment to a foreign personal representative would, in effect, require the debtor to examine the records of every surrogate's office in the state. Such a rule, it was most appropriately said, would be exceedingly burdensome to debtors and seriously interfere with the collection of debts. The *Restatement of Conflict of Laws*³⁷⁶ has adopted the pronouncement of the New York court by making the lack of knowledge on the part of the debtor of the appointment of a local personal representative the sole condition for his discharge. But while voluntary payments made to a foreign personal representative have in some instances been recognized as a valid discharge of the debtor's obligation if he has received no notice of the appointment of an ancillary representative,³⁷⁷ some states are willing to give

³⁷⁴ See Basye, "The Venue of Probate and Administration Proceedings," 43 MICH. L. REV. 471 at 477 et seq. (1944), p. 535 et seq., *supra*.

³⁷⁵ *Maas v. German Savings Bank*, 176 N. Y. 377, 382, 68 N. E. 658 (1903).

³⁷⁶ RESTATEMENT, CONFLICT OF LAWS (1934) § 482.

³⁷⁷ *Maas v. German Savings Bank*, 176 N. Y. 377, 68 N. E. 658 (1903); *Compton v. Borderline Coal Co.*, 179 Ky. 695, 201 S. W. 20 (1918). See also Mersch, "Voluntary Payment to Foreign Administrator," 18 GEO. L. J. 130 (1930) and statutes cited in note 389, *infra*.

an acquittance to the debtor only in the event that no ancillary representative has in fact been appointed,³⁷⁸ and still others only in the event that an ancillary representative is not appointed later.³⁷⁹

In a few states³⁸⁰ legislation expressly provides that local debtors may pay debts to a decedent's personal representative in another state if they have no knowledge of local administration proceedings. Of this legislation, the Ohio and Rhode Island statutes permit payment at any time; the Oregon statute requires thirty days' notice to the state treasurer; and the Virginia statute authorizes such a procedure only after ninety days from the death of the decedent, unless the amount is more than \$1,000, in which event public notice for four weeks is required followed by an additional thirty days before making such payment. In the Illinois statute provision is made for the debtor to rely upon an affidavit furnished by the foreign personal representative that he has no knowledge of any letters issued in that state.

This rule is also contained in the Uniform Powers of Foreign Representatives Act in which it is provided³⁸¹ that, in the absence of local administration or application therefor, a foreign personal representative may exercise all powers which would exist in favor of a local personal representative. Pay-

³⁷⁸ *Rice v. Metropolitan Life Ins. Co.*, 152 Ark. 498, 238 S. W. 772 (1922); *Union Trust Co. of San Francisco v. Pacific Telephone & Telegraph Co.*, 31 Cal. App. 64, 159 P. 820 (1916); *Selleck v. Rusco*, 46 Conn. 370 (1878); *Cameron v. Riggs National Bank* (D. C. Dist. Col. 1943), 53 F. Supp. 56 (after one year); *McNamara v. McNamara*, 62 Ga. 200 (1879); *In re Williams' Estate*, 130 Iowa 553, 107 N. W. 608 (1906); *Fidelity Trust Co. v. Williams*, 32 Ky. L. Rep. 303, 105 S. W. 952 (1907); *Citizens' National Bank v. Sharp*, 53 Md. 521 (1880); *Morrison v. Berkshire Loan & Trust Co.*, 229 Mass. 519, 118 N. E. 895 (1918); *Reynolds v. McMullen*, 55 Mich. 568, 22 N. W. 41 (1885); *Dexter v. Berge*, 76 Minn. 216, 78 N. W. 1111 (1899); *Willard v. Hammond*, 21 N. H. 382 (1850); *Gray's Appeals*, 116 Pa. 256, 11 A. 66 (1887).

³⁷⁹ *Crohn v. Clay County State Bank*, 137 Mo. App. 712, 118 S. W. 498 (1909); *Young v. O'Neal*, 3 Sneed (35 Tenn.) 55 (1855).

³⁸⁰ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 416; Ohio Gen. Code (Page, 1937) § 10511-3; Ore. Comp. Laws (1940) § 19-302; R. I. Gen. Laws (1938) c. 575, § 26; Va. Code (1942) § 5349a.

³⁸¹ Uniform Powers of Foreign Representatives Act, § 2.

ment by the debtor is clearly obligatory and his acquittance, upon payment, is equally certain. The debtor is thus relieved of any uncertainty as to the effect of payment by him under such circumstances. Another section³⁸² of this Act expressly provides that no person who makes payment to the foreign representative before receiving actual notice of local administration or application therefor shall be prejudiced, although local proceedings have been begun or applied for. Simplification and unification of administration on decedents' estates are thus rendered possible.

A larger number of statutes³⁸³ authorize such payments only if no administration has in fact been commenced. In most instances authenticated copies of domiciliary letters must be filed in local probate courts or furnished to the debtor. The Alabama statute permits such payments only after sixty days, the Oregon statute after ninety days, and the Maine statute after six months. The Vermont statute is unnecessarily narrow in confining its application to bank deposits. Notice to local creditors or other interested persons is required in Maine and New Hampshire; and in Maine the foreign personal representative must obtain permission from the local probate court to entitle him to receive such payment.

³⁸² Uniform Powers of Foreign Representatives Act, § 5.

³⁸³ Ala. Code (1940) t. 61, § 141 (after sixty days); Fla. Stat. Ann. (Supp. 1945) § 734.30 (after three months); Kan. Gen. Stat. (Supp. 1943) § 59-1707; Me. Rev. Stat. (1944) c. 141, § 82 (after six months and no objection by local creditors); Miss. Code (1942) § 622; Mo. Rev. Stat. Ann. (1942) § 272 (after six months' notice and payment to any local creditors who may appear and file claims) and § 6024 (insurance proceeds); N. H. Rev. Laws (1942) c. 353, §§ 28, 29 (after notice to residents and authorization by local probate court after expiration of six months after death); N. J. Stat. Ann. (1937) § 3:14-1; Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 995 (upon filing an affidavit by the foreign personal representative with the register of wills that decedent is not indebted to any person in Pennsylvania and that the receipt is not made for the purpose of removing assets beyond the reach of Pennsylvania creditors); S. C. Code (1942) § 8955; Tenn. Code (Michie, 1938) § 1288; Vt. Pub. Laws (1933) § 6719 (as to bank deposits only, but by § 2726 the tax commission must be notified, which will in turn notify the bank whether any personal representative has been appointed in Vermont); Wis. Stat. (1943) § 287.16 (upon filing certified copy of appointment in Wisconsin).

2. *Actions by foreign personal representatives*

One might expect to find that the right of foreign personal representatives to enforce payment of debts due their decedents would follow this same pattern as in the cases of voluntary payment by debtors. While it might be agreed that the foreign personal representative had such title to his decedent's property as to entitle him to give a valid receipt for voluntary payment by the debtor, it is another thing to say that he may sue to enforce payment in the courts of another state. In its early stages the law developed the rule that a personal representative could not maintain an action outside the state of his appointment in the absence of statutory permission.³⁸⁴ It is still generally accepted that a personal representative is an officer only in the jurisdiction of the court which appointed him, although he has authority extending throughout the state. He has no authority outside the borders of that state by virtue of his appointment there. Consequently, unless a statute of the debtor's state authorizes actions by foreign personal representatives, the domiciliary representative is powerless to enforce collection and ancillary administration may be a necessary consequence.

Over a period of years, however, states have gradually opened their doors and given permission to a foreign personal representative to sue in the local courts.³⁸⁵ The general tenor of legislation on this subject is to grant power to foreign repre-

³⁸⁴ 3 BEALE, *CONFLICT OF LAWS* (1935) § 507.1.

³⁸⁵ Ala. Code (1940) t. 61, § 151; Ark. Dig. Stat. (1937) § 1399; Colo. Stat. (1935 and Supp. 1944) c. 176, §§ 141, 142; Del. Rev. Code (1935) § 3868; D. C. Code (1940) t. 20, § 505; Fla. Stat. Ann. (Supp. 1945) § 734.30; Ga. Code Ann. (1936) §§ 113-2401 to 113-2404; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 419; Ind. Stat. (Burns, 1933) § 6-908; Kan. Gen. Stat. (Supp. 1943) § 59-1708; Ky. Rev. Stat. (1944) § 395.170; Me. Rev. Stat. (1944) c. 141, § 82; Minn. Stat. (1941) § 573.05; Miss. Code (1942) § 622; Neb. Rev. Stat. (1943) § 30-807; N. J. Stat. Ann. (1937) § 3:13-7; N. M. Stat. (1941) § 33-209; Ohio Gen. Code (Page, 1937) § 10509-165; Okla. Stat. (1941) t. 58, § 262; R. I. Gen. Laws (1938) c. 575, § 27; S. D. Code (1939) § 35.1103; Wis. Stat. (1943) § 287.16.

sentatives to maintain actions in much the same manner as local representatives are authorized to do. The recent Uniform Powers of Foreign Representatives Act,³⁸⁶ authorizing such actions in the absence of local administration or application therefor, should give added impetus to this desirable method of procedure. A needless administration is thus dispensed with in many cases where the only function of a personal representative is to enforce payment of a debt. Unless there are local creditors whose interests also deserve local protection, there is no reason why a foreign personal representative should not be allowed to enforce such payment.

If it is thought that this does not afford adequate protection to local creditors, it may be said that they are or should be afforded ample time either before or during the pendency of such actions to apply for letters and thus make sure that they may receive payment through local administration. If local creditors do not take advantage of their right to apply for administration within a reasonable time after death, no valid objection should be raised against the maintenance of actions by the domiciliary representative. If statutes have barred the rights of creditors when no local administration has been applied for or granted within a reasonable time, this right to sue would seem to follow. However, no specific statute to this effect has been noted. Since only the rights of local creditors to local enforcement of their claims is involved, and not a liability to complete extinction,³⁸⁷ the period allowed to local creditors to apply for administration should be quite short, say sixty or ninety days. This would give a reasonable amount of protection to local creditors and at the same time obviate the requirement of needless administration.

³⁸⁶ Uniform Powers of Foreign Representatives Act, §§ 2, 3.

³⁸⁷ The state of domicile must entertain the presentation of claims by all creditors irrespective of their residence. The federal Constitution requires this. *Blake v. McClung*, 172 U. S. 239, 19 S. Ct. 165 (1898).

A few of the statutes noted above³⁸⁸ attempt to secure a measure of convenience to local creditors. Thus, Alabama permits local creditors or distributees to intervene; Colorado, Delaware, the District of Columbia, and Kentucky require a bond for the protection of local creditors; and Illinois requires the substitution of a local personal representative if one should be appointed pending the action. Actions by a foreign personal representative are not permitted in Florida prior to the expiration of three months, nor in Rhode Island prior to the expiration of six months after the decedent's death. This much of an opportunity is afforded to local creditors to institute ancillary administration or otherwise obtain local enforcement of their claims.

If actions by foreign representatives are not permitted, the recovery of assets may be possible by assigning the debt or other interest in property to a third party who may then institute an action in his own name and in his own right. In a majority of states where the question has been directly presented, such actions have been permitted.³⁸⁹

3. *Transfer of mercantile specialties*

Much the same considerations apply to the transfer of stock or other registered securities by corporations in a state other than that of the decedent's domicile. The traditional view has been to treat shares of stock as having a situs at the domicile of the corporation so as to require administration there.³⁹⁰ Opposing this is the mercantile theory which treats the at-

³⁸⁸ See statutes cited in note 385, *supra*.

³⁸⁹ The leading case on this subject is *Petersen v. Chemical Bank*, 32 N. Y. 21 (1865). For a full discussion and collection of authorities, see Buchanan and Myers, "The Administration of Intangibles in View of First National Bank v. Maine," 48 HARV. L. REV. 911, 921-924 (1935) and Beale, "Voluntary Payment to a Foreign Administrator," 42 HARV. L. REV. 597, 600-604 (1929). Some cases have denied the right of an assignee for collection to maintain an action. See *Thacker v. Lindahl* (Tex. Comm. App. 1932), 48 S. W. (2d) 588.

³⁹⁰ 3 BEALE, CONFLICT OF LAWS (1935) §§ 477.1 to 477.4.

tributes of ownership of stock certificates and similar instruments which pass by endorsement or delivery as having the same situs as the instruments themselves, and which places the power of the domiciliary representative to transfer the stock on the same basis as other chattels physically located at the decedent's domicile.³⁹¹ Thus transfers of stock certificates by a domiciliary representative, supported by appropriate documents showing authority to make such transfers, are entitled to recognition in other states. The elimination of numerous ancillary administrations would follow as a matter of course from this theory. In an attempt to simplify to this extent the problem of administering estates, several states have passed statutes³⁹² which specifically authorize corporations to make transfers of stocks and registered bonds from the domiciliary representative in the absence of ancillary administration in the state of the corporation's domicile. The *Restatement*³⁹³ has likewise adopted this rule of convenience.

4. *Release of mortgages by foreign personal representatives*

While local prejudices have tended to confine the activities of foreign representatives to the state of their appointment, certain situations have operated to extend their activities. For example, when a decedent dies owning a mortgage on property situated in another state, it may be highly advantageous

³⁹¹ 3 BEALE, CONFLICT OF LAWS (1935) §§ 477.1, 477.2. See also the opinion of Mr. Justice Holmes in *Direction der Disconto-Gesellschaft v. United States Steel Corporation*, 267 U. S. 22, 45 S. Ct. 207 (1924).

³⁹² Cal. Civ. Code (Deering, 1941) § 328d; Ga. Code Ann. (1936) § 113-2406; La. Gen. Stat. (Dart, 1939) § 610; Me. Rev. Stat. (1944) c. 141, § 82; Md. Code (1939) art. 93, §§ 81, 82; Minn. Stat. (1941) § 291.19; Mo. Rev. Stat. Ann. (1942) § 272; Neb. Rev. Stat. (1943) § 77-2017; N. H. Rev. Laws (1942) c. 353, §§ 28, 29 (upon authority of local probate court); N. M. Stat. (1941) §§ 34-109, 34-110; Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 995; R. I. Gen. Laws (1938) c. 575, § 25; S. C. Code (1942) § 8955; Tenn. Code (Michie, 1938) § 1288; Va. Code (1942) § 5349a; W. Va. Code (1943) §§ 4263, 4264.

³⁹³ RESTATEMENT, CONFLICT OF LAWS (1934) § 477(2). See also 72 A. L. R. 179 et seq. (1931).

for the mortgagor to have the mortgage satisfied of record by the foreign personal representative, without requiring ancillary administration. This would be especially true if the mortgage had been paid prior to the death of the mortgagee but formal satisfaction had not been made. No useful purpose would be served by requiring the appointment of an ancillary representative for the mere purpose of making formal satisfaction. If such were required, local land titles would too often be clouded with unreleased mortgages.

As might be expected in this situation, legislation³⁹⁴ has been extremely liberal in authorizing a foreign personal representative to satisfy local mortgages left by their decedents, upon recording an authenticated copy of his letters. Statutes of this kind greatly facilitate land title procedure and obviate unnecessary ancillary administration; it is not surprising, therefore, to find that this procedure is authorized irrespective of the possibility of the existence of local creditors. The interests of local creditors are subordinated to the paramount interests of local mortgagors.

5. *Collection of tangible personal property*

The preceding discussion has been largely confined to the administration of intangibles. The problems incident to the reduction to possession or recovery of tangible personal property arises much less frequently today than formerly. Nevertheless it is an important part of the larger problem under consideration. It has often been said that the domiciliary representative has all the rights of ownership which the decedent had during his lifetime with respect to property owned

³⁹⁴ Ala. Code (1940) t. 61, § 141; Cal. Civ. Code (Deering, 1941) § 2939½; Conn. Gen. Stat. (1930) § 5031; Fla. Stat. Ann. (Supp. 1945) § 734.30; Idaho Laws Ann. (1943) § 15-813; Iowa Code (1939) §§ 11897 to 11900; Kan. Gen. Stat. (Supp. 1943) § 59-1707; Minn. Stat. (Mason, 1927) § 8792; N. J. Stat. Ann. (1937) §§ 3:7-11.1, 3:14-1; Okla. Stat. (1941) t. 58, § 262; Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 995; S. C. Code (1942) § 8955; Wyo. Rev. Stat. (1931) § 71-224.

by him.³⁹⁵ In application, however, this generalization is an overstatement, if not a misstatement. Certainly if a local personal representative is appointed in the jurisdiction where tangible personalty belonging to the decedent is located, he and he alone is entitled to receive delivery of it or to sue for its possession.³⁹⁶ On the other hand, if no local personal representative is appointed, there is authority for permitting the voluntary delivery of tangible personal property to the domiciliary representative,³⁹⁷ or even to the heirs directly under some circumstances.³⁹⁸ There is no substantial difference in the policies permitting the voluntary payment of a debt and those permitting the voluntary delivery of chattels under such conditions. But if the person in possession or control of the property refuses to deliver it and an action for recovery is necessary, the same rules exist as were considered in the bringing of actions by foreign personal representatives. As seen previously, actions by a foreign personal representative are not ordinarily allowed in the absence of statutory permission. Whether the denial of this right be due to lack of title or is merely a procedural obstacle, the result is the same—an inability to collect assets in a foreign jurisdiction without taking out ancillary administration there.

6. *Sale of land by foreign personal representatives*

Another purpose for which foreign personal representatives are allowed to extend their activities outside the state of their appointment is that of selling, leasing or mortgaging land³⁹⁹

³⁹⁵ *Wilkins v. Ellett*, 9 Wall. (76 U. S.) 740 (1869); *Petersen v. Chemical Bank*, 32 N. Y. 21 at 43 (1865).

³⁹⁶ *McCully v. Cooper*, 114 Cal. 258, 46 P. 82 (1896).

³⁹⁷ RESTATEMENT, CONFLICT OF LAWS (1934) §§ 472-475.

³⁹⁸ See discussion in subdivision III-D-2, *supra*.

³⁹⁹ Personal powers conferred upon a representative by the will of a decedent are not included. The discussion here refers only to statutory powers given to foreign personal representatives in their representative capacity and not to personal powers conferred upon executors.

for the purpose of paying debts or legacies. From considerations already discussed, it would seem to follow that in carrying out this function the foreign personal representative would be encroaching upon local prerogatives. Nevertheless the land is an immovable and cannot be removed out of the jurisdiction, although the proceeds from its sale may be so removed. Several statutes⁴⁰⁰ have been passed to authorize foreign representatives, without obtaining local letters, to apply to local probate courts and obtain authority to sell land for these purposes. It is customary to require the foreign representative to furnish authenticated copies of the domiciliary proceedings and also to give a bond to secure creditors and other interested parties. As in the case of authorizing foreign representatives to satisfy mortgages, local creditors are not unduly inconvenienced.

7. *Clearing title to land*

It is a well known fact that where a decedent leaves only real estate in a foreign jurisdiction, ancillary administration is frequently taken out as a formality in order to bar the rights of possible creditors and to give a marketable title. In the vast majority of these cases no creditors appear and the whole procedure becomes a mere formality which serves to restrain the alienation of the real estate in the interim. Special statutes of nonclaim applying in the absence of administration have already been discussed.⁴⁰¹ These are fully effective for the purpose. The practical objection to most of these statutes is that the period provided to bar creditors is too long to afford free alienability and marketable title within a reasonable

⁴⁰⁰ Ga. Code Ann (1936) § 113-2405; Ind. Stat. (Burns, 1933) §§ 6-1141 to 6-1143; Me. Rev. Stat. (1944) c. 150, §§ 14, 15; Mass. Ann. Laws (1932) c. 202, §§ 32 to 35; Neb. Rev. Stat. (1943) §§ 30-1133 to 30-1138; N. H. Rev. Laws (1942) c. 358, § 12; Ohio Gen. Code (Page, 1937) § 10511-27; Wis. Stat. (1943) §§ 287.16, 316.30, 316.31.

⁴⁰¹ See notes 289 to 319, *supra*.

period. At the present time the best legislation designed to promote marketability and alienability of land left by non-resident decedents is found in Ohio.⁴⁰² There it is provided that when administration has been granted in any other jurisdiction on the estate of a decedent and no administration has been had in Ohio, the domiciliary representative may file in any county in Ohio where the decedent left real estate an authenticated copy of his letters, whereupon creditors are notified by publication for three weeks. If creditors make claims within six months and their claims remain unsatisfied after reasonable notice to the non-resident personal representative, ancillary administration may be had. Otherwise the lien of creditors is extinguished.

A similar procedure is suggested in the Uniform Powers of Foreign Representatives Act.⁴⁰³ Upon application by a foreign representative to the probate court where land of a decedent is located, notice of his appointment is published, and unless creditors file their claims within a specified time, their claims are barred as a lien upon all property of the decedent within such state. If claims are presented and remain unpaid after reasonable notice to the foreign representative, ancillary administration may be granted. The effect of this Act, like the Ohio statute, is to provide an opportunity for local creditors to enforce their claims in their own jurisdiction, and to specify a period of nonclaim in much the same manner as if ancillary administration were carried out.

Other statutory methods also exist to facilitate the transfer of property in a foreign jurisdiction without requiring ancillary administration there. When a non-resident decedent leaves property in South Dakota⁴⁰⁴ or Wyoming⁴⁰⁵ which has a value not to exceed \$10,000 and administration has been

⁴⁰² Ohio Gen. Code (Page, 1937) § 10511-2.

⁴⁰³ Uniform Powers of Foreign Representatives Act, § 4.

⁴⁰⁴ S. D. Code (1939) § 35.0801.

⁴⁰⁵ Wyo. Rev. Stat. (1931) § 88-918.

had in another state, administration in either of the two states named may be dispensed with after one year from the decedent's death on filing with the probate court a verified petition therefor with certified copies of the petition, the order of appointment of the domiciliary representative, and the inventory and final decree of distribution therein. After notice by publication for three weeks, the court is authorized to have the domiciliary probate proceedings admitted as a probate or administration of the estate in those states. If creditors appear, the hearing is postponed to permit such creditors to apply for letters of administration. But if no creditors appear, this summary procedure affords a satisfactory substitute for *full* ancillary administration.

Proceedings to determine heirship or distributees have already been discussed ⁴⁰⁶ in another connection. Proceedings of this kind are particularly useful in the case of non-resident decedents, although they are applicable to resident and non-resident decedents alike. Where administration proceedings have not been had in a state other than the decedent's domicile and creditors have become barred by the lapse of time, such proceedings will often furnish a simple and effective method of supplying the final indicia of marketable title to land located in the other state. ⁴⁰⁷

IV. CONCLUSIONS AND RECOMMENDATIONS

The current demand for the improvement of probate procedure is toward two objectives: clarity and simplicity. Much has been done in the past decade in revising, and also in re-writing entire probate codes. Much will be done in the years just ahead. In undertaking the task of simplification the primary functions of administration should be constantly

⁴⁰⁶ See subdivision III-D-4, *supra*.

⁴⁰⁷ There is also always the question of the determination and discharge of the state's lien for inheritance taxes. See note 363, *supra*.

kept in mind. By way of summary and recommendations for methods to dispense with administration in whole or in part, several things may be said.

First, when an estate is small and administration is neither had nor contemplated, statutes should afford the surviving family of a decedent a means of collecting the assets of the estate without the necessity of resorting to administration. Estates up to some agreed value should be embraced within such legislation. This amount should not be so small as to render such legislation useless except in insignificant estates. Furthermore, the family of the decedent entitled to invoke its provisions should not be limited to those entitled to homestead, exemptions or family allowance, but should include all persons who would be classed as distributees. The Model Probate Code ⁴⁰⁸ contains concrete suggestions for legislation of this kind. A lapse of thirty days after death is required before invoking its provisions in order to afford creditors an opportunity to apply for administration. The payment or delivery of assets to the heirs pursuant to the terms of such statutes is not intended, however, to preclude administration at a subsequent date. If letters are granted later, only the heirs to whom such payment or delivery may have been made should be accountable to the personal representative who is appointed.⁴⁰⁹ In the absence of administration, such statutory devices supply a much needed method for the small estate which is not indebted. For several years statutes of this kind ⁴¹⁰ have functioned well in California and Illinois where they are primarily utilized to collect bank deposits, wage claims, insurance proceeds and the like, and to transfer the family automobile and small amounts of registered securities. Statutes in some states authorizing the payment of wages,

⁴⁰⁸ §§ 86, 87.

⁴⁰⁹ See *Brezzo v. Brangero*, 51 Cal. App. 79, 196 P. 87 (1921); Wash. Rev. Stat. (Supp. 1943) §§ 3249-1 and 3249-2.

⁴¹⁰ See discussion in subdivision III-D-2, *supra*.

bank accounts or only one kind of debt are unnecessarily restricted in function.

Second, if the value of the estate does not exceed that to which the surviving family of the decedent would be entitled as homestead, exempt property and a family allowance, a wholesome provision would authorize the surviving spouse or minor children to petition the probate court asking that the same be set aside to them for these purposes, and that an order then be made that no administration is necessary. Procedure of this kind should be as simple as possible, eliminating all unnecessary formalities. Inasmuch as notices may not be required to creditors and others who may have a possible interest, such an order may well be made subject to revision, correction or annulment within a substantial period of time after it has been made. This will encourage full disclosure and an opportunity to all interested persons who may not have had an opportunity to be heard at the time the order was made. The Model Probate Code contains such provisions⁴¹¹ and places an upper limit of \$2,500 upon the value of estates, exclusive of homestead and exempt property, to which it applies. Since the expenses of the last illness and funeral charges must be paid by the surviving family as a condition precedent to invoking these provisions, the amount of \$2,500 will do no more than furnish a minimum of a family allowance. Such an estate should not be subjected to the expense of formal administration.

Third, if letters have been granted to a personal representative and it later appears that the estate of a decedent, exclusive of homestead, exemptions and family allowances does not exceed the amount of preferred claims, the personal representative should be authorized to distribute the estate for these purposes so far as may be done and thereupon present his report and account for final settlement, and upon the approval

⁴¹¹ §§ 88-91.

and allowance thereof, be discharged. As already mentioned, statutes of this kind or some variation thereof exist in many states at the present time.⁴¹² A similar section is contained in the Model Probate Code.⁴¹³

All of the foregoing methods, it will be noted, are intended to aid the summary administration or to eliminate the necessity of administration on small estates. To require the family or dependents of a decedent of small means to pursue the regular routine of administration, with its delays in transmitting the property to those entitled to it, and subject to the expenses incidental thereto, seems obviously unfair and unnecessary in an enlightened age. In none of these situations are the interests of creditors adversely affected. In the third method, court supervision is fully provided for. In the second method, court inspection and authorization are required. And in the first method, resort to judicial administration is always possible by a creditor or other person interested, to the end that the interests of every interested person are amply protected.

In larger estates it is true that all the heirs may make distribution of the decedent's property by an informal family settlement,⁴¹⁴ if they are able to make collection of all the assets and there are no creditors to insist upon administration. It is also true that most states recognize the validity of such settlements when made, insofar as the parties to them are concerned. In view of the possible interests of creditors in all cases, and of distributees in some cases, the advisability of authorizing such a procedure by statute seems questionable. A contrary opinion may be supported from the experience of those few states⁴¹⁵ which do authorize such a procedure but,

⁴¹² See discussion in subdivision III-B-1-a, *supra*.

⁴¹³ § 92.

⁴¹⁴ An informal family administration and distribution is meant here, not a compromise settlement involving adversary rights of distributees under a will or by the laws of intestacy.

⁴¹⁵ See discussion in subdivision III-B-3 and 4, *supra*.

generally speaking, it is likely that a more orderly and satisfactory distribution of a large estate can be effected by a formal administration. This is not to say that informal family settlements should not be recognized. On the contrary they should be fully recognized when made. But problems arising in connection with such settlements are probably better solved by ordinary case law, as they have largely been solved in the past.

As to actions by the heirs to enforce payment of debts due the decedent, without resorting to administration, an argument can be made for permitting or for denying them. While it is true that in rare instances creditors may be prejudiced, it is also true that creditors may invoke their right to apply for administration. And if such debts are collected by the heirs, it does not follow that they are lost to creditors. In fact, they are subject to administration, if a personal representative is subsequently appointed. The more pertinent inquiry is whether the proceeds are more likely to be lost or dissipated in the hands of the debtor or in the hands of the heirs.

In addition to these three basic methods for dispensing with administration, various other devices have been discussed in the preceding pages. Some of these, such as the independent executor under a nonintervention will and the withdrawal of an estate from administration, are said to work satisfactorily in the states where they are used. Others, in particular instances, are no more than alternative ways of accomplishing the objectives outlined and authorized by the basic methods above described. This is often true in such matters as making distribution to the heirs of a distributee who dies during administration, or in making distribution of an estate of a person who dies while under guardianship. In both of these latter instances, there is the added advantage of having distribution made pursuant to the order of a probate court having jurisdiction of a decedent's estate in one case and of a ward's estate

in the other. In the final analysis, the virtue of any given method for dispensing with administration is dependent upon the extent to which the basic functions of administration are accomplished in the particular situation.

Administration may be dispensed with in any case in which the heirs can and do make collection and distribution of assets, irrespective of amount, to all those entitled to them, including creditors, and to the federal and state governments for estate and inheritance taxes. The efficacy of any such informal settlement will depend upon the agreement of all the heirs and the actual satisfaction of all creditors. In no case should it be said that administration is a required proceeding. An administration proceeding is intended to secure useful functions in society—to be a servant, not a dictator of procedure for its own sake.

The dominant function of administration in Anglo-American law has been the protection of creditors. It is submitted, however, that we have carried this to an extreme. Ordinarily the running of the statute of limitations is stopped upon death. The statute of nonclaim is substituted after administration is granted. But ordinarily no general nonclaim statute operates against creditors in the absence of administration. Whatever arguments may be made in favor of the retention of this as a rule, the fact remains that the marketability of property, both real and personal, is usually impaired. In a commercial society free marketability is an objective in itself. Statutes in a number of states⁴¹⁶ have barred the claims of creditors after the expiration of specified periods of time following the death of a decedent when administration has not been had. Such a statute should exist in every state. It should apply to personal as well as to real property, and it should bar any creditor from applying for administration.⁴¹⁷ The

⁴¹⁶ See discussion in subdivision III-D-1, *supra*.

⁴¹⁷ See Model Probate Code, § 135 (d).

trend toward shortening the period of time could well be carried further.

Similarly the state should be required to be diligent in asserting its lien for estate or inheritance taxes. Failure to take steps for their determination and collection within some reasonable period of time should likewise operate to free the assets of the estate from the state's lien.

When a decedent leaves property located in several jurisdictions, administration in more than one jurisdiction should be rendered unnecessary as far as possible. If domiciliary letters are granted, payments to, actions by, and the transfer and delivery of property to the domiciliary representative in any state should be an established procedure upon some reasonable basis. The rights of local creditors and distributees are important, but their assumed existence has been emphasized to the point of making ancillary administration a requirement all too often to no real end. It is suggested that the lapse of some short period of time without the commencement of proceedings for local administration should be sufficient to justify full recognition of the powers and authority of the domiciliary representative in that state. Thus the interests of local creditors and distributees are not extinguished but are merely relegated to the domiciliary state for assertion.⁴¹⁸

The problem of clearing title to land in a state other than that in which the decedent was domiciled remains. The experience under the Ohio statute,⁴¹⁹ which has been followed in the Uniform Powers of Foreign Representatives Act,⁴²⁰ reveals a simple expedient for the purpose.

When a decedent leaves a will, the question may arise as to whether administration may be dispensed with, even though the will is probated. A statute, of course, may require the

⁴¹⁸ For concrete suggestions in this respect see Uniform Powers of Foreign Representatives Act, §§ 2, 3.

⁴¹⁹ Ohio Gen. Code (Page, 1937) § 10511-2.

⁴²⁰ § 4. See discussion in subdivision III-E-6, *supra*.

delivery of a will by the person in possession of it to the court. Its probate, however, is not automatic upon delivery. A proceeding to probate the will is distinct from a proceeding to administer the estate of a decedent. The fact that the latter is customarily carried on in connection with the former, at the same time, and in the same court, is likely to lead to the conclusion that the two constitute a single proceeding. Historically and functionally, however, they are separate. A proceeding to administer an estate is not a necessary consequence of the probate of a will. If the devisees or legatees are able to make physical collection of the assets and agree upon a distribution among themselves, and if there are no creditors to insist upon administration, their action is clearly lawful. Although not usually stated in so many words, it is expressed or implied in several statutes⁴²¹ that a will may be probated without being followed by administration. The rights to the decedent's property will be governed by the provisions of the will, but subject to the rights of homestead, exemptions and family allowance, which are independent of a will. Under the usual statutes dispensing with administration, the rights of devisees and legatees, as such, are not important, for the estate of the decedent is entirely consumed in setting off homestead and exempt property and in paying a family allowance. However, where the beneficiaries of a decedent's will, without taking out administration, proceed under a statute authorizing the collection by them of assets less than a designated sum, they may be permitted to avail themselves of this power without first probating the will.⁴²²

⁴²¹ See, for example, Colo. Stat. (Supp. 1944) c. 176, § 62; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 478; N. C. Rev. Stat. (1943) §§ 31-27 to 31-29; Ohio Gen. Code (Page, 1937) § 10511-20; Wis. Stat. (1943) § 238.19. Such statutes are particularly common when domiciliary administration has been had in one state and the will is then probated in a foreign jurisdiction without granting letters thereon.

⁴²² Under Cal. Prob. Code Ann. (Deering, 1944) §§ 630 and 630.5 an unprobated will may be the basis of payment of money or delivery of assets to the beneficiaries designated therein. See also Fla. Stat. Ann. (Supp. 1945) §§ 735.01 to 735.13.

A general survey of the legislation discussed in this study indicates that the eastern states are far more inclined to regard administration on a decedent's estate as the normal course of procedure. This is particularly true where inheritance taxes are applied to successions without allowing more than a bare minimum of exemptions. In those states, debtors cannot safely pay the heirs without incurring a possible liability to the state for inheritance taxes as well as to creditors for their claims. The natural tendency of such tax laws is to exert a strong pressure upon heirs to take out administration in every estate. The tendency in the west is in the other direction, particularly in small estates. Furthermore, the large majority of statutes barring creditors, upon the expiration of a designated period of time after death and in the absence of administration, are in the west. Such devices as the independent executor acting under a nonintervention will, the withdrawal of estates from administration, and direct distribution to the heirs of a distributee who dies during administration may be local examples, but they also represent a feeling that the traditional process of administration is not an absolute for every decedent.

In states where it is felt that administration upon estates should be retained as a norm, probate procedure should be streamlined. Every method possible should be employed to shorten and to simplify the task of the personal representative in his duties in order that distribution of the estate may be made to those entitled to it as soon as possible. Notices could be combined; notices by mail could be substituted for notices by publication; and times of notice could be shortened. And most important of all, the nonclaim period should be shortened so as not to exceed six months. The trend to reduce the nonclaim period which has already acquired a momentum during the past decade, will likely continue along with the larger movement of procedural reform under way.

From a consideration of the functions to be achieved by administration, it would seem that legislation for dispensing with administration should be confined primarily to the small estate. Other legislation for the same purpose should be valued according to the manner in which it permits the accomplishment of the basic purposes of administration. In no event should administration be required as a process. If heirs can make collection and distribution of an estate and pay all claims, legislation should not prohibit it. In larger estates both the problems of claims, including the determination of estate and inheritance taxes, and of distribution are such as to cause the persons interested to pursue the usual course of administration.

The Function of Will Contests*

Lewis M. Simes

I. INTRODUCTION

TO anyone steeped in the doctrines of the common law there is something anomalous about the will contest. First, the will is duly admitted to probate in a proceeding which is almost universally conceded to be judicial. Then at a subsequent time a so-called contest is brought by the heir, in which the precise proposition determined on the probate is retried. In most jurisdictions the heir is not bound to make any sort of a showing to entitle him to contest. He need not allege newly discovered evidence. He need not submit any evidence of fraud or mistake. Indeed, in some states, he may even have attended the original probate proceeding and sat by without a murmur of dissent while the will was judicially approved. Yet the law says he may now, merely for the asking, wipe out the effect of the decree admitting the will to probate and have the whole matter heard anew. This is not appeal in any true sense of the word, though in many jurisdictions it is called an appeal with trial *de novo*; nor is it a hearing on certiorari, though such a hearing may sometimes be granted by a still higher court with respect to the contest itself. It is not a new trial for cause; since, in most states, no cause need be shown. It is, in short, a unique sort of hearing which finds its only justification as a part of a legal system in the uniqueness of the matters with which it deals.

It is, of course, obvious that these observations do not apply to a contest which is a part of, and the same as, the original probate proceeding. If a will is presented to the court by a devisee or executor to be probated and an heir puts the pro-

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ponent's allegations in issue, the trial of that issue at that point in the proceeding is quite as much in accord with the spirit of our legal system as the trial of the due execution of a contract when a promisee brings an action for its breach. But no one ever heard of the contest of a contract or of a deed, separate and apart from the original action on that contract or deed. And unless the probate of a will possesses peculiarities all its own, it is difficult to see why probate should be regarded as distinct from contest.

It is the primary purpose of this paper to consider what are the proper functions of will contests. In this connection, statutes and case law dealing with the various aspects of will contests will be considered with a view to determining what is the underlying theory of the will contest in the various jurisdictions and whether various subsidiary rules concerning it are consistent with that theory. By way of conclusion, we shall attempt to determine what should be the rationale of an ideal piece of legislation on will contest. We shall deal chiefly with the so-called contest after probate, since contest before probate is ordinarily nothing more than a determination of the due execution of the will as an issue in the probate proceeding. But it should be noted that in some jurisdictions legislation appears to indicate that a contest before probate is also more or less distinct from probate itself. Certainly that type of legislation should come in for consideration in connection with any adequate treatment of the function of contest.

It is hoped, moreover, that a clear understanding of the nature and function of will contests will tend to reduce litigation and to result in more coherent legislation. Though it may not reduce directly the number of will contests, yet, if the law is clarified, the number of appeals from will contests should be substantially decreased. Moreover, if suitable limitations on will contests are inserted in statutes which deal with them, contests should also be less frequent.

Up to this point the meaning of the term "will contest" has been assumed. But before proceeding, it should be made explicit. The expression "will contest,"¹ as used in this paper, means any proceeding or part of a proceeding in which the question whether a given instrument is the duly executed and unrevoked will of a competent testator is put in issue. It is to be distinguished from a mere *ex parte* probate proceeding in which no allegations of the proponent of a will are controverted. The term is not limited to statutory proceedings designated as contests, but is used to include any proceeding to admit a will to probate in which its execution or revocation is put in issue; it includes an appeal from an order admitting a will to probate in which the issue is tried *de novo*; a proceeding to revoke the probate of a will; a probate in solemn form; an action at law in the nature of ejectment or trespass in which the issue of will or no will is tried; a chancery proceeding in which the issue is the due execution of a will. In short, practically any proceeding in which the due execution or revocation of a will is put in issue is a contest.

This paper, however, does not deal with the constructive trust as a device to give effect to a will discovered after administration is closed; nor with an action of tort brought by a devisee of an unprobated will against an heir who has wrong-

¹ Although the term "will contest" has come into almost universal use in the United States, it has seldom been used in England. However, an early edition of Jarman on Wills refers to a legatee as "having contested the validity or effect of a will." JARMAN, A TREATISE ON THE CONSTRUCTION OF DEVISES (22 Law Library, 1838) p. *296. It has been suggested that the term comes from the "litis contestatio" of Roman law. See *In re Cronin's Will*, 143 Misc. 559, 257 N. Y. S. 496 at 503 (1932) and *Clemens v. Patterson*, 38 Ala. 721 at 722 (1863). As to the "litis contestatio" in Roman law, see BUCKLAND, A TEXTBOOK OF ROMAN LAW (2d ed. 1932) 695. As to its application to procedure in the ecclesiastical courts, see CONSET, PRACTICE OF THE SPIRITUAL COURTS (3d ed. 1708) 85; LANGDELL, EQUITY PLEADING (1877) xv; 3 BURN, ECCLESIASTICAL LAW (9th ed. 1842) 189. CONSET, *op. cit.* 371, refers to the will as being "contested."

The term "contest" appears in American statute law as early as 1711. See Va. Laws, Act of Nov. 1711, c. 2, in 4 Statutes at Large of Virginia, edited by Henning (1820) 14.

fully destroyed the will. Yet each of these situations may involve a determination of the due execution of the will. Nor do we consider the contest of foreign wills, or of nuncupative wills, or of lost or destroyed wills, since such minor differences in the law of contest as may be found there add nothing to our understanding of the matter of function.

II. PROBATE AND CONTEST IN ENGLISH LAW

Since American probate procedure is modeled after the English pattern, it is important to consider what constituted will contest in England. Prior to 1857, wills involving personality were probated in the ecclesiastical court. From the time when the first edition of *Swinburn on Wills* appeared until courts of probate were set up shortly after the middle of the nineteenth century, the procedure seems not to have greatly varied.² Probate could be either in common form or in solemn form, the latter being also described as probate in form of law or probate *per testes*. If in common form, the proceeding was summary; no notice was given to anyone. The will could be admitted to probate on the mere oath of the executor that he believed it to be duly executed, though additional proof was sometimes required. It is commonly stated that at any time within thirty years³ after the will had been admitted to probate in common form it could be proved anew

² SWINBURN, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES (1590) 224, 225. The following discussions of the subject appear to be patterned more or less after Swinburn: GODOLPHIN, ORPHANS LEGACY (3d ed. 1685) 62; 1 WILLIAMS, EXECUTORS (Amer. ed. 1832) *188-195; 4 BURN, ECCLESIASTICAL LAW (9th ed. 1842) 315-322; LOVELASS, THE LAW'S DISPOSAL OF A PERSON'S ESTATE WHO DIES WITHOUT WILL OR TESTAMENT; TO WHICH IS ADDED THE DISPOSAL OF A PERSON'S ESTATE BY WILL AND TESTAMENT (25 Law Library, from the 12th London ed. 1839) *408-410.

³ Swinburn says there is a presumption of due execution of a will after ten years. Most other writers say that the will cannot be proved in solemn form after thirty years. In 4 BURN, ECCLESIASTICAL LAW (9th ed. 1842) 318 it is suggested that the word "ten" in Swinburn is a misprint for "thirty." It is possible that there may be some connection between this rule and the rule of evidence as to the presumed authenticity of documents after thirty years. See

in solemn form; although it is not entirely clear that there was any time limit. Or the executor or some other interested party could have secured its probate in solemn form in the first instance and before any other probate was sought. When probate was in solemn form, notice was given to interested parties who were permitted to oppose the admission of the will; and the attesting witnesses were produced to testify in support of the will.

Until the latter part of the nineteenth century,⁴ a will, insofar as it involved freehold interests in land, was not subject to probate in the sense in which a will of personalty was said to be probated. That is to say the will was regarded as passing the title to land automatically on the death of the testator, just as a deed passes title on its delivery. The validity of the will might be determined incidentally in an action of trespass or ejectment involving the land devised. But the judgment determined the matter only as between the parties as of the time when the action was brought. Just as in the case of title by deed, any number of subsequent actions of trespass or ejectment might be brought with varying results.

It is true, equity would sometimes take steps to have a devise of land proved; but the result added up to no more than what was permissible in the court of law. Thus, a devisee might, under certain circumstances, go into equity

7 WIGMORE, EVIDENCE (3d ed. 1940) § 2138. The rule as to wills of personalty, however, is said to involve a period of thirty years after probate in common form; while the evidence rule, when applied to wills of land, has been held to mean thirty years from the execution of the will. See *Doe d. Oldham v. Wolley*, 8 B. & C. 22 (1828). It has been said that there is no recognized time limit on the probate of wills in solemn form in the ecclesiastical courts. See *FOURTH REPORT BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY* (1833) 39; *REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES* (1832) 37; *Richardson v. Claney*, 2 Phillimore 228 note (a), at 231 (1802).

⁴ In *The Goods of John Bootle*, L. R. 3 P. & D. 177 (1874).

and ask to have his title determined.⁵ Chancery would direct the devisee and heir to frame an issue of *devisavit vel non* and have it tried in an action at law before a jury. When the court of equity became satisfied, after one or more verdicts at law, that title was in the devisee and that the will was good, interference by the heir might be enjoined. The devisee might also file a bill in equity to perpetuate testimony and the court would compel the attesting witnesses to come in and testify. These two procedures were sometimes denominated proving the will in equity,⁶ just as the trespass or ejectment action was sometimes described as proving the will at law.⁷ The following succinct statement from *Adams on Equity* indicates the precise extent to which equity established a will of land:⁸

“The validity of a will of real estate, and of the consequent title of the devisee, is triable only by the Courts of common law. If the devisee being out of possession seeks to enforce the will, or if the heir being out of possession seeks to set it aside, their respective modes of doing so are by ejectment at law. If there be outstanding terms or other legal impediment, they may respectively come into equity to have them removed. If either party being in possession fears that his possession may be subsequently disturbed, he may perpetuate the testimony on a proper bill; or if after a satisfactory verdict and judgment, he is harassed by repeated ejectments, he may have an injunction to restrain them on a bill of peace. But neither party can resort to the Court of Chancery as a tribunal for the trial of the will. If, however, there be a trust to perform or assets

⁵ *Pemberton v. Pemberton*, 13 Vesey 290 (1807); *Bootle v. Blundell*, 19 Vesey 494 (1815); *Tatham v. Wright*, 2 Russ & My. 1 (1831); *Lowe v. Joliffe*, 1 Wm. Black. 365 (1762); *Mountain v. Bennet*, 1 Cox Ch. 353 (1787), 2 Dick. 683 (1787); 3 WOODDESSON, LECTURES ON THE LAW OF ENGLAND (2d ed. 1834) 477-479; 2 STORY, EQUITY JURISPRUDENCE (1st ed. 1836) 671.

⁶ See POWELL, DEVISES (1st Am. ed. 1807) 714. As to the bill to perpetuate testimony, see 1 HARRISON, CHANCERY (7th ed. 1790) 784; 2 *id.* 282.

⁷ See POWELL, DEVISES (1st Am. ed. 1807) 702.

⁸ ADAMS, EQUITY (2d Am. ed. 1852) *249.

to administer, so that the will is drawn within the cognizance of equity, there is an incidental jurisdiction to declare the will is established, after first directing an issue *devisavit vel non*, to try its validity at law. By the old practice it was necessary to establish a will against the heir, whenever the Court was called upon to execute its trusts, but the rule is now abolished. The issue *devisavit vel non*, when a declaration of establishment is asked, is demandable as of right by the heir; for he can be disinherited only by the verdict of a jury. But he may waive this right by his conduct."

Such was the system of will contest in England at a time when American jurisdictions were taking over English legal principles. Clearly illogical in sharply differentiating land and personalty, it merely gave another expression to a distinction which runs all through English common law. It may not be possible to state with certainty, and perhaps it would be futile to attempt to do so, why the ecclesiastical courts took over the disposition of a dead man's personalty but not his realty. Even as to the personalty it was said not to be by common right but only by English custom,⁹—whatever that may mean. But the upshot of the matter seems to have been that the church desired to have a hand in disposing of a dead man's estate, a part of which he commonly wished to appropriate for the good of his soul.¹⁰ Obviously land was too important in a feudal society to be entrusted to religious tribunals; for in those days, land was government, land was social status, in short, land was the very foundation of the social order.

Conceding that the interplay of compromise must have resulted in giving probate of wills of personalty to the ecclesiastical courts and such probate as there was of wills of

⁹ GODOLPHIN, ORPHANS LEGACY (3d ed. 1685) 59,—"*de Consuetudine Angliae & non de Comuni Jure.*"

¹⁰ See 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1911) 332.

realty to the secular courts, this does not explain the wide diversity in the two concepts of probate. Nor is any adequate explanation forthcoming; yet the theory of each was perfectly rational. Probate in the ecclesiastical court was the authentication of a document. This authentication was contemporaneous with the grant of authority to the personal representative; it did not determine the legal effect of the will. But it said to the executor: "The testator made this will; he appointed you his executor. Take his personal estate and administer it according to the terms of the will."

On the other hand, the determination of the validity of a will of land in a court of law was essentially an *inter partes* determination of the title to a particular piece of land. It decided both the validity and the legal effect of the will in giving title to the devisee. But it decided this only as it decided the validity of a deed when an action of trespass or ejectment put in issue the title to particular land which it purported to convey.

In the case of the will of personal property, the contest was obviously the probate in solemn form. That it could come after probate in common form did not in any way indicate that the law permitted two trials of the same issue. Probate in common form was no trial. Indeed, it has been definitely asserted by an eminent authority on English, ecclesiastical law¹¹ that it was not a judicial proceeding. Essentially it was a mere formal administrative authentication of the instrument;¹²

¹¹ In 2 PHILLIMORE, ECCLESIASTICAL LAW (1873) 1210, it is pointed out that the voluntary jurisdiction of the ecclesiastical court, including the granting of probate of wills, is not a judicial proceeding. The learned author therefore concludes that when the bishop selects a subordinate to act in voluntary proceedings, he is delegating the function; but if it were a true judicial function, the subordinate would be acting as judge for himself, since a judicial function cannot be delegated.

¹² See FOURTH REPORT BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY (1933) 55; REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832) 37.

and the contest—the probate in solemn form—was the first and only real hearing of the issue of due execution. There were two good reasons for permitting probate in common form without notice before probate in solemn form. First, in the vast majority of cases there would never be any contest or any disagreement of interested parties as to the distribution of the estate. Hence a system which reduced the formalities to a minimum was desirable. Second, even if a later contest might take place, the preservation of the estate demanded that a responsible person take charge of it as soon as possible after the death of the testator; and to delay until notice to interested parties and a hearing on the will was had would in many instances permit a wasting of the estate.¹³

Contest in the case of real estate recognized even more fully that no litigation about the will is necessary in the ordinary situation. Its underlying theory was this: Contest takes place only when the title to devised land is put in issue. It operates to authenticate the instrument only to the extent that the judgment in that case is an estoppel between the parties.¹⁴

It thus appears that broadly speaking the theory of contest in the case of wills of personalty and of realty was not as widely divergent as might be supposed. In each type of will it is assumed that there is no contest, no adjudication of the due execution of the will, in the ordinary case. Only when some exceptional circumstance gives rise to a dispute is there

¹³ "A very little consideration will show that it would be absolutely impossible to establish any *a priori* guards or cautions, which would not, from the delay and expense, occasion an infinitely greater loss to the Public, than may sometimes arise from what is called snatching Probate of a paper, afterwards found not entitled thereto. Any notice to Heirs-at-law, next of Kin, prior Devisees, or Legatees, would be found utterly incompatible with that expedition and economy, which are the most essential ingredients in the administration of every-day justice." REPORT BY THE COMMISSIONERS TO INQUIRE INTO THE PRACTICE AND JURISDICTION OF THE ECCLESIASTICAL COURTS IN ENGLAND AND WALES (1832) 37.

¹⁴ See RESTATEMENT, JUDGMENTS (1942) § 68; Scott, "Collateral Estoppel by Judgment," 56 HARV. L. REV. 1 (1942).

any judicial proceeding in the true sense. In the case of personalty, it is true, a formal authentication is always given to the will and title to the personal estate is handed over to the personal representative. In the case of land, the will is accepted at its face value in the ordinary case, and as vesting title in the devisee without even a formal authentication.

The real nature of probate and contest as applied to various kinds of subject matter is nowhere more clearly brought out than in the *Fourth Report of the Real Property Commissioners of England*, made in 1833.¹⁵ "Probate in common form," they asserted, "is in effect a mere registration of the Will, and we apprehend that there is no necessity for the machinery of a Court to discharge this office of the present Spiritual Courts, and that every advantage of Probate in common form may be obtained by the establishment of a Register. . . ." They then proposed that all wills, whether involving real or personal property, should be registered; but that probate should be abolished. In the ordinary case, the registration was to be sufficient. But if a contest was desired, whether involving real or personal estate, then a bill in equity to establish the will might be filed, and in this suit an issue could be directed to a court of law.

As a matter of fact, many of the recommendations of this Commission were not adopted. In 1857, however, legislation was enacted which took away the jurisdiction of the ecclesiastical courts over probate of wills and vested it in a probate court.¹⁶ This legislation extended probate to wills involving both real and personal estate. By subsequent reorganizations of the judiciary, the Probate Division, which was the successor to the court of probate, became a part of the High Court of

¹⁵ FOURTH REPORT BY THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY (1833) 55.

¹⁶ 20-21 Vict. c. 77, §§ 3, 4, p. 240.

Justice.¹⁷ The Land Transfer Act of 1897¹⁸ provided for the probate of wills involving land only and vested title to the realty of decedents in the personal representative rather than in the heir or devisee. Although probate in common form is still retained in name, it consists essentially in a registration of the will with the probate registry and an authentication of it. Probate in solemn form may be resorted to as in early English law except that such probate may be had as to wills of real estate as well as of personalty, and the trial of the issue takes place in the Probate Division.¹⁹ It will thus be seen that Parliament did not adopt the idea of the Real Property Commissioners of 1833, who wished to unify the law of will contest by applying the method of contesting wills of land to wills of personalty; instead, the law was unified by applying the method of contesting wills of personalty,—namely, probate in solemn form,—to wills of land.

III. CONTEST OF DEVISE OF LAND IN ACTION AT LAW TO TRY TITLE BECOMES OBSOLETE

Perhaps the first sharp veering away from the English model was the recognition in America of the jurisdiction of courts of probate and similar courts to admit to probate wills involving land. Indeed, from the scanty data which has been examined, one wonders whether in most of the colonies it was ever supposed that one could not probate a will involving real estate. Certainly the probate of wills involving land was usual by the early part of the nineteenth century. In Virginia a statute enacted in 1711²⁰ expressly provided for

¹⁷ 36-37 Vict. c. 66, p. 191 (1873); 15-16 Geo. 5, c. 49, p. 1197 (1925). For a brief statement of the present probate jurisdiction in England, see Simes and Basye, "The Organization of the Probate Court in America," 42 MICH. L. REV. 965 at 974-976 (1944), and pp. 395-398, *supra*.

¹⁸ 60-61 Vict. c. 65, p. 184.

¹⁹ 15-16 Geo. 5, c. 49, §§ 150-175 (1925); TRISTAM AND COOTE, PROBATE PRACTICE (18th ed. 1940) 389-399.

²⁰ 4 Statutes at Large of Virginia (Hening, 1820) 13.

the probate of wills involving land. Such wills were subject to probate in North Carolina by legislation enacted in 1784.²¹ A Connecticut decision²² holds that the probate in 1797 of a will involving land was conclusive. A Pennsylvania case²³ decided in 1791 discusses the effect of the probate of a will involving land; and a Maryland case²⁴ decided in 1816 indicates that the probate of wills involving land had long been recognized in that state. One cannot say that the English view, to the effect that a decree admitting a will to probate was without effect as to realty, was never followed in this country; for one early New Jersey case²⁵ so holds. But it is reasonably certain that today in every jurisdiction in the United States a duly executed testamentary disposition involving land may be admitted to probate.²⁶

Conceding, however, that in all states today a will involving land *may* be admitted to probate, does that exclude the introduction of an unprobated will in an action in the nature of ejectment or trespass to try title to land? In nearly all jurisdictions today the answer is clearly in the affirmative. There was, however, a period in which there must have been much uncertainty about the matter. The Supreme Judicial Court of Massachusetts, it is true, in a case decided in 1822,²⁷ held

²¹ Laws of North Carolina (Iredell, 1791) 528, Acts of Gen. Assembly, 1st Sess. 1784, c. 10, § 6.

²² Judson v. Lake, 3 Day (Conn.) 318 (1809).

²³ Fenn, Lessee of Walmesley v. Read, 1 Yeates (Pa.) 87 (1791).

²⁴ Massey v. Massey's Lessee, 4 Harr. & Johnson (Md.) 141 (1816).

²⁵ Den d. Thomas v. Ayres, 13 N. J. Law 153 (1832).

²⁶ Statutes expressly require probate of a will of land in Arkansas, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Vermont and Wisconsin. These statutes are collected in the appendix note to the Model Probate Code for §§ 81 and 85, p. 304, supra. There is clear authority to the same effect in some other states. In the rest the rule is not questioned, but the statutory expression of it is not clear. Such authority as exists is as follows: Inge v. Johnston, 110 Ala. 650, 20 So. 757 (1895); Ariz. Code (1939) § 38-202; Cal. Prob. Code Ann. (Deering, 1944) § 323; Castro v. Richardson, 18 Cal. 478 (1861); Colo. Stat. (1935) c. 176, §§ 47, 50; Johns v. Jackson, 67 Conn. 81, 34 A. 709 (1895); Del. Rev. Code (1935) § 3799; D. C. Code (1940) § 11-503; Rogers v. Rogers, 78 Ga. 688, 3 S. E. 451

that the jurisdiction of the probate court to admit to probate a will devising land is exclusive, and unless the will has been so admitted it cannot be proved in an action to try title. In a note to that decision, moreover, the reporter refers to another case in which substantially the same thing had been held some thirty years earlier. But in other jurisdictions it was held that the decree admitting a will to probate was merely evidence in an action to try title but was not conclusive; and that, if the will had not been admitted to probate at all, it could nevertheless be proved in an action to try title to the land.²⁸

Doubtless one potent influence in the direction of eliminating proof of an unprobated will in an action of trespass or ejectment was the decision of Justice Story in *Tompkins v. Tompkins*²⁹ in 1841 to the effect that the statutes of Rhode Island gave the probate court exclusive jurisdiction to determine the validity of a will involving land and that its determination could not be attacked collaterally in an action to try title. Another significant influence in the same direction was the enactment of the following statute as a part of the Massachusetts Revised Statutes of 1836:³⁰

(1887); Idaho Laws Ann. (1943) § 15-202; *Rogers v. Stevens*, 8 Ind. 464 (1857); Md. Code (1939) art. 93, § 353; *Rothschild v. Hatch*, 54 Miss. 554 (1877); *Farris v. Burchard*, 242 Mo. 1, 145 S. W. 825 (1912); Mont. Rev. Code (1935) § 10021; Nev. Comp. Laws (Supp. 1941) § 9882.06; *Moss v. Lane*, 50 N. J. Eq. 295, 23 A. 481 (1892); N. M. Stat. (1941) § 16-410; N. Y. Surr. Ct. Act, §§ 139, 151; *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. 427 (1889); Okla. Stat. (1941) t. 58, § 22; *Jones v. Dove*, 6 Ore. 188 (1876); *Cochran v. Young*, 104 Pa. St. 333 (1883); S. D. Code (1939) § 35.0202; *Taylor v. Taylor*, 2 Humph. (21 Tenn.) 597 (1841); *Lagow v. Glover*, 77 Tex. 448, 14 S. W. 141 (1890); Utah Code (1943) § 102-3-2; Va. Code (1942) § 5262; Wash. Rev. Stat. (1932) § 1371; W. Va. Code (1943) § 4078; Wyo. Rev. Stat. (1931) § 88-210.

²⁷ *Shumway v. Holbrook*, 1 Pick. (18 Mass.) 114 (1822). And see *Laughton v. Atkins*, 1 Pick. (18 Mass.) 535 at 548 (1823).

²⁸ *Jackson ex dem. Le Grange v. Le Grange*, 19 Johns. (N. Y.) 386 (1822); *Smith's Lessee v. Steele*, 1 Harr. & McH. (Md.) 419 (1771); *Smith v. Bonsall*, 5 Rawle (Pa.) 80 (1835); *Executors of Crosland v. Murdock*, 4 McCord (S. C.) 217 (1827). And see cases cited in 2 GREENLEAF, EVIDENCE (1st ed. 1846) § 672.

²⁹ 1 Story 547, Fed. Cas. No. 14,091 (1841).

³⁰ c. 62, § 32.

"No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court; and the probate of a will devising real estate shall be conclusive as to the due execution of the will, in like manner as it is of a will of personal estate."

That this was already the common law of Massachusetts is pointed out in the Revisers' notes as follows:³¹

"This is in accordance with the established law in this state; but as it differs from the law in other places, and is a provision of very extensive and important influence, it may be useful to insert it in the text of our statutes."

Today the state of the law is about as follows.³² In twelve states statutes similar to the Massachusetts legislation just quoted are in force, which make it clear that a will involving land must be probated in order to be admitted to prove a title. In seven other states legislation in a different form undoubtedly has the same effect. Then there is authority to the effect that, since the probate court has been given jurisdiction to admit to probate wills involving land, that jurisdiction is impliedly exclusive and therefore an unprobated will cannot be used to prove a title in an action in the nature of trespass or ejectment.³³ As the Connecticut court said:³⁴ "Our statutes commit the probate of all wills to the Courts of Probate; and it has been held in this State that that court is the only tribunal competent to decide the question of the due execution of a will—including the testamentary capacity of the testator. . . . Hence a party who desires to show title by a will, to

³¹ REPORT OF THE COMMISSIONERS APPOINTED TO REVISE THE STATUTES, Part II (1834) 28. The statement appears in the note to c. 62, § 20.

³² See Model Probate Code, Appendix A, note to §§ 81 and 85, p. 304, *supra*.

³³ See *Swazey's Heirs v. Blackman*, 8 Ohio 5 (1837); *Jones v. Dove*, 6 Ore. 188 (1876); *Cummins v. Cummins*, 1 Marvel (15 Del.) 423 at 440, 31 A. 816 (1895). In general, see cases cited in note in *Ann. Cas.* 1916 A 887.

³⁴ *Johnes v. Jackson*, 67 Conn. 81 at 90, 34 A. 709 (1895). The same view is well expressed in *Castro v. Richardson*, 18 Cal. 478 (1861).

personal property or real estate, can have it received as evidence of such title, only after it has been established in the proper Court of Probate; because that is the only way in which he can show that the will under which he claims, is genuine."

In New York it appears that, if the will involving real estate is admitted to probate, the decree to that effect is conclusive as against collateral attack.³⁵ But if it is not offered for probate, then apparently the unprobated will may be proved in an action to try title to the land involved.³⁶ The same also appears to be the rule in Virginia.³⁷ In Tennessee there is a line of authority indicating that a will involving land cannot be proved until it is admitted to probate;³⁸ there are, however, indications in the statutes and cases³⁹ that under some circumstances, at least, an unprobated will may be proved in an action to try title and that a decree admitting a will to probate may be attacked collaterally in such an action. It should be pointed out that in New York⁴⁰ and Virginia,⁴¹ and perhaps elsewhere, an unprobated will involving land is not entitled to be recorded. Therefore, the contest of a will in those jurisdictions in an action in the nature of ejectment would seem to have small practical value, and is probably a little used device.

It thus appears that the contest of a will, in an action to try title to land, is, for most practical purposes, obsolete in the United States. The remainder of the discussion proceeds upon this assumption.

³⁵ See N. Y. Surr. Ct. Act, § 80.

³⁶ *Corley v. McElmeel*, 149 N. Y. 228, 43 N. E. 628 (1896).

³⁷ *Bagwell v. Elliott*, 2 Rand. (23 Va.) 190 (1824).

³⁸ *Taylor v. Taylor*, 2 Humph. (21 Tenn.) 597 (1841); *Weaver v. Hughes*, 26 Tenn. App. 436 at 443, 173 S. W. (2d) 159 (1943).

³⁹ *Weatherhead v. Sewell*, 9 Humph. (28 Tenn.) 272 (1848); Tenn. Code (Michie, 1938) § 8127.

⁴⁰ N. Y. Surr. Ct. Act, § 152.

⁴¹ Va. Code (1942) § 5262.

IV. TYPES OF WILL CONTESTS DEVELOPED IN THE UNITED STATES

So far the evolution of Anglo-American law of will contest is all to the credit of the American states. There was no good reason why a will of land should not be probated once and for all just as a will of personalty. If it was desirable to have the matter settled finally as to the personal property, it was even more desirable to have a final determination as to real estate. Thus, our legislatures and courts determined that a will involving land must be probated; and they reached this rational conclusion decades before the same reform took place in England.⁴²

But here our favorable balance in the ledger of history ends. As will appear more fully in the survey of legislation which follows, in a large number of states the rational basis of the will contest was entirely overlooked; and the modification of the English system which took place left us with a totally anomalous legal device.

Before embarking upon a survey of American statutes, however, it may be pointed out that the first step in classifying the various jurisdictions is to divide them on the basis of the presence or absence of notice for the initial probate. If notice is not required and is not given for the initial probate, there will necessarily be a basis for contest after probate and we shall always find it. On the other hand, if notice *is* required for the initial probate, either there is no reason for contest after probate or the reason must be entirely different from that which justifies the contest after probate in the other group of states. But whether the initial probate proceeding is begun with or without notice, contest after probate, if it exists at all, follows one of three patterns: (1) the hearing is

⁴² Wills of land were not subject to probate in England until legislation enacted in 1857 so provided. See note 16, *supra*.

like probate in solemn form in that it is before the same tribunal which admitted the will to probate; (2) the hearing is in a higher tribunal, usually chancery or the trial court of general jurisdiction, and bears a superficial resemblance to a trial of the issue *devisavit vel non* as directed by English chancery;⁴³ and (3) though the statutes in terms provide only for contest before probate, an appeal with trial de novo to the trial court of general jurisdiction has the effect of a will contest. As we shall see, the provisions for will contests in the respective states⁴⁴ involve almost every conceivable combination of the various patterns and bases for classification which have been suggested.

Taking up first the jurisdictions in which probate may be initiated without notice, we find two groups of states: (1) those which follow the pattern of the English probate in common and in solemn form; and (2) those which provide for a contest in a higher tribunal than that in which the will was probated. This classification is further complicated by the fact that an appeal with trial de novo is permitted in some of them but not in others, and that, in at least one of them, no contest before probate is permitted.

Second, we shall consider those jurisdictions in which notice is required for the initial probate. We shall see that a very few of them permit contest only before probate; others provide expressly for contest both before and after probate in the same court; still others provide for contest after probate in a higher tribunal than that in which the will was probated; and a very considerable number, while professing to permit contest only before probate, in fact permit a contest after probate in the guise of an appeal with trial de novo in the trial court of

⁴³ But the proceeding in this country, unlike the English prototype, is in rem and does not concern any particular land or other estate. This will be apparent from the discussion of the law of particular jurisdictions which follows.

⁴⁴ In this survey, the law of Louisiana is excluded, since it is of civil law origin.

general jurisdiction. The picture is further complicated by the fact that, in a few states in which probate is always preceded by notice, a will contest can take place only after probate.

A. JURISDICTIONS PERMITTING PROBATE WITHOUT NOTICE

1. *Common and solemn form probate in same court*

In the following states, the English system of common and solemn form probate is rather closely followed: Delaware,⁴⁵ Florida,⁴⁶ Georgia,⁴⁷ Indiana,⁴⁸ Maryland,⁴⁹ Mississippi,⁵⁰ New Hampshire,⁵¹ North Carolina⁵² and South Carolina.⁵³ In general, this means that the original probate may be without notice, or, if something in the nature of a caveat is filed, it is with notice. If the original probate is without notice,

⁴⁵ Del. Rev. Code (1935) §§ 3799 to 3802. The statutes are contained in a chapter on "Settlement of Personal Estates" but would seem to apply to wills involving land since § 3799 provides that the record of the probated will "shall be sufficient evidence in respect to both real and personal estate." Proof may be taken without notice, or notice to interested parties may be given on request; § 3800 provides for a caveat at any time before probate; § 3801 gives a right of review to "any person interested who shall not voluntarily appear at the time of taking the proof of a will, or be served with citation or notice as provided in Section [3799]."

⁴⁶ Fla. Stat. Ann. (1941) §§ 732.23 to 732.31. Probate is in the county judge's court. This may be without notice, § 732.23, or apparently may be initiated with notice, § 732.30. After probate "any interested party" may have notice given, § 732.28. An heir or distributee may file a caveat, whereupon he is given notice, § 732.29. Any heir or distributee, "except those who have been served with citation before probate or who are barred under 732.29" may petition for revocation of probate, § 732.30.

⁴⁷ Ga. Code Ann. (1936) §§ 113-601 to 113-618.

⁴⁸ Ind. Stat. (Burns, 1933 and Supp. 1943) §§ 7-501 to 7-508, 7-511, 7-513. Contest may be in the circuit court, either before or after probate.

⁴⁹ Md. Code (1939) art. 93, §§ 353, 357 to 363, for probate and contest in the orphans' courts. But see § 370 as to an issue "*devisavit vel non* sent from a court of equity."

⁵⁰ Miss. Code (1942) §§ 503 to 508. Probate and contest are in equity, § 495. But the general plan is that of probate in common or solemn form.

⁵¹ N. H. Rev. Laws (1942) c. 351, §§ 6 to 9.

⁵² N. C. Gen. Stat. (1943) §§ 31-32 to 31-37. Probate in common form takes place before the clerk of the superior court. Probate in solemn form is in the superior court.

⁵³ S. C. Code (1942) §§ 8932 to 8934.

then there may be a contest thereafter on notice to interested parties. To this group of states we may add, also, Oregon⁵⁴ and Washington,⁵⁵ although it is not entirely clear in those states whether the original probate can be contested, or whether there must first be a probate without notice, followed by a contest with notice.⁵⁶ This, on the whole, would seem to be a perfectly rational scheme; but it should be noted that legislation in at least three of these jurisdictions,⁵⁷ namely Georgia, New Hampshire, and Oregon, permits a trial *de novo* on an appeal to the trial court of general jurisdiction.

The following quotation is made from the Georgia legislation, by way of illustrating the kind of statute here considered:⁵⁸

"113-601. Probate of a will may be either in common or solemn form. In the former case, upon the testimony of a single subscribing witness, and without notice to anyone, the will may be proved and admitted to record. Such probate and record is not conclusive upon anyone interested in the estate adversely to the will. . . ."

"113-602. Probate by the witnesses, or probate in solemn form, is the proving of the will, after due notice to all the heirs at law, by all the witnesses in life and within the jurisdiction of the court, or by proof of their signatures and that of the testator, if the witnesses are dead or inaccessible; and the ordering to record of the will so proved. Such probate is conclusive upon all the parties notified, and all the legatees under the will who are represented in the executor."

⁵⁴ Ore. Comp. Laws (1940) §§ 19-202 to 19-204, 19-208 (amended Laws 1945, c. 185).

⁵⁵ Wash. Rev. Stat. (1932) §§ 1385 to 1389.

⁵⁶ The statutes and cases do not make the point entirely clear, but see 1 BANCROFT'S PROBATE PRACTICE (1928) § 109 and note 3.

⁵⁷ Ga. Code Ann (1936) § 6-501; N. H. Rev. Laws (1942) c. 365, § 11; Ore. Comp. Laws (1940) § 10-810. And see, in general, Simes and Basye, "The Organization of the Probate Court in America," 42 MICH. L. REV. 965 at 995, footnotes 151 and 152 (1944) and p. 421, *supra*. It is possible also, that appeal with trial *de novo* may be had in South Carolina. See S. C. Code (1942) §§ 231 and 233; *Muldrow v. Jeffords*, 144 S. C. 509, 142 S. E. 602 (1927); *Ex parte White*, 33 S. C. 442, 12 S. E. 5 (1890).

⁵⁸ See note 47, *supra*.

"113-605. Probate in common form shall become conclusive upon all parties at interest after the expiration of seven years from the time of such probate, except minor heirs at law who require proof in solemn form and interpose a caveat within four years after arrival at age. . . ."

While there is much variation in the respective statutes referred to, they all appear to prescribe this same general type of contest.

It would seem also that Arkansas⁵⁹ now should belong to this group of states, since both probate and contest are in chancery. However, its legislation has developed from a type of will contest similar to that described in the next subdivision.

2. *Contest in a higher court after probate*

Much greater variation is found in the legislation involved in the seven states which may fairly be classed in this group than in the group just discussed. Hence, the states will be considered one by one. In the case of Virginia, the history of will contests in that state will be outlined, partly because

⁵⁹ The compilation of Arkansas statutes of 1937 includes provisions for probate and contest resembling the English probate in solemn and in common form. Ark. Dig. Stat. (1937) §§ 14540 to 14544. The court of probate was empowered to grant probate in solemn form without notice. Or probate could take place on previous notice. An appeal to the circuit court with trial de novo was recognized. Ark. Dig. Stat. (1937) §§ 14530, 14543. Ark. Dig. Stat. (1937) § 14545 provided that certain persons might "within three years after such final decision in the circuit court, by a bill in chancery, impeach the decision and have a retrial of the question of probate. . . ." In 1939 a constitutional provision and certain legislation vested probate jurisdiction in the court of chancery. Ark. Const., Amend. 24; Ark. Acts 1939, Act 3, p. 6. It has been said, however, that this change did not completely consolidate the two courts, but provided for "probate courts in chancery." *Lewis v. Smith*, 198 Ark. 244 at 248, 129 S. W. (2d) 229 (1939). The appeal to the circuit court with trial de novo appears to have been taken away. Ark. Acts 1939, Act 214, p. 526. By Ark. Acts 1941, Act 401, p. 1169, it was provided:

"That in any case where a will has been admitted to probate without notice having previously been given to the heirs of the deceased testator, a contest of the probation or legality of such will may be heard by the court probating the same. Any heir of the deceased testator may, within six months after the probation of such will, but not thereafter, file a complaint in said court setting out the grounds upon which the legality of such will is contested. . . ."

it is typical of the sort of evolution which has taken place in other states, and partly because the Virginia legislation furnished the model for other jurisdictions.

(a) *Virginia*. Although a brief statute enacted in 1645 gave the county courts jurisdiction to probate wills of residents,⁶⁰ the first legislation in Virginia dealing with will contests was enacted in 1711.⁶¹ It provided for the probate of wills of land as well as of personalty. If a will involved land, the heir was to be summoned to appear at the proving of the will "to show forth anything that shall or may be lawfully alledged against such proof. . . ." There was also a saving clause allowing to persons under disability ten years after their disabilities were removed in which they might contest the probate of the will.

In 1744 additional legislation was enacted⁶² for the reason that, as stated in its preamble, "the proof of wills in the general court, or county courts of this colony, where lands are devised away from the heir or heirs at law of the decedent, is attended with inconveniences to the executors, and losses in the personal estate." This enactment provided as follows:

"That from and after the passing of this act, when any wills are exhibited to be proved in the general court, or any county court of this dominion, it shall and may be lawful to and for the said courts, to proceed immediately to receive the proof of such wills; and to appoint appraisers to value the slaves and personal estate of such testator.

Provided always, That where the lands of such testator, or any part thereof, shall, by such wills, be devised away from the heir or heirs at law, such proof as to him, her, or them, shall not be binding; but such heir or heirs shall be summoned, in the manner directed by law, and shall and may be at liberty to contest the validity of such will, in the same manner as if this act had never been made."

⁶⁰ 1 Virginia Statutes at Large (Hening, 1809) 302.

⁶¹ 4 Virginia Statutes at Large (Hening, 1820) 12.

⁶² 5 Virginia Statutes at Large (Hening, 1819) 231.

In 1748 this legislation was amended⁶³ by adding a provision extending the time to contest in case of disabilities. The amendment also made it reasonably clear that the notice to the heirs in the case of a will involving land might take place after probate. After the clause to the effect that the will shall not be binding as to the heir, the amendment continued "but the court shall cause such heir or heirs to be summoned, to appear at the next court, and to contest the validity of such will, . . . and if no heir be known . . . then proclamation of such will, being exhibited and proved, shall be made by the sheriff . . . and he shall also publish notice thereof, in writing, and all persons concerned in interest, who at the time of proving any will, shall be under the age of one and twenty years, feme covert, *non compos mentis*, imprisoned, or out of this colony, shall have liberty to contest the proof thereof, within ten years after their several disabilities and incapacities removed, and not afterwards."

Thus, it would seem that notice before probate, which was required as to wills of land in the legislation of 1711, had not proved satisfactory, and that apparently later amendments permitted a return to the old system of probate without notice.

However, the legislation which was to be the basis of all subsequent will contest statutes in Virginia was enacted in 1785. The important provisions of it are as follows:⁶⁴

"XI. When any will shall be exhibited to be proved, the court having jurisdiction as aforesaid, may proceed immediately to receive the proof thereof, and grant a certificate of such probat: If however, any person interested, shall within seven years afterwards appear, and by his bill in chancery contest the validity of the will, an issue shall be made up, whether the writing produced be the will of the testator or

⁶³ 5 Virginia Statutes at Large (Hening, 1819) 454.

⁶⁴ 12 Virginia Statutes at Large (Hening, 1823) 142.

not, which shall be tried by a jury, whose verdict shall be final between the parties; saving to the court a power of granting a new trial for good cause, as in other trials; but no such party appearing within that time, the probat shall be forever binding.

"XII. In all such trials by jury, the certificate of the oath of the witnesses, at the time of the first probat, shall be admitted as evidence, to have such weight as the jury shall think it deserves."

The significance of this legislation is aptly expressed by the court in *Coalter's Ex'r v. Bryan*,⁶⁵ as follows:

"The obvious purpose of these provisions is, 1. To recognize the *ex parte* probat of wills, both of realty and personality; 2. To extend the privilege of requiring a reprobat, so as to embrace both; 3. To prescribe a period of limitation for such reprobat; 4. To change the citation for reprobat, so as to require it to be of those interested in sustaining the will, instead of those interested in opposing it; 5. To shift the final probat from the court of original probat to the court of chancery, to be there exercised by the instrumentality of a jury; 6. To provide against the loss of testimony in support of the will, which might result from the delay of the final probat, by authorizing, for the consideration of the jury, documentary evidence of the proof at the first probat."

Without attempting to list all the statutory modifications made from time to time in this legislation, the following important changes may be noted. In 1838⁶⁶ a provision was inserted by which the proponent of a will could institute the proceeding for probate with notice to interested parties if he so desired. But the provisions for probate without notice and a trying of the issue of will or no will in chancery were retained, and all are embodied in the Code of 1849.⁶⁷ The 1849 Code permits a devisee to contest a finding adverse to the

⁶⁵ 1 Gratt. (42 Va.) 18 at 79 (1844).

⁶⁶ Va. Acts 1838, c. 92, p. 71.

⁶⁷ Va. Code (1849) c. 122, §§ 29-36.

will,⁶⁸ just as an heir could contest a finding in favor of the will.

The present legislation in Virginia on will contests may be summarized as follows:⁶⁹

Probate jurisdiction is vested in circuit and corporation courts and in various clerks of court and their deputies. The probate of a will may be instituted either with or without notice. If the will is admitted by a clerk, any person interested may have an appeal as of right within six months in the same court. The appeal is to be heard by the court "as though it had been presented to the said court in the first instance." Where the original probate is by the court there is no trial *de novo* on appeal. The court or any person interested in the probate of the will, may cause interested persons to be summoned; and notice of the hearing as to probate may be given by publication. In such a proceeding the final order "shall be a bar to a bill in equity to impeach or establish such will, unless on such ground as would give to a court of equity jurisdiction over other judgments at law." It is also provided that any court having jurisdiction to probate wills may proceed to establish a will *ex parte* and without notice. In such a proceeding, or on an appeal with trial *de novo* from a decision of a clerk, a person not a party to the original proceeding may proceed by bill in equity to impeach or establish the will. On this bill, a trial by jury is to be ordered to ascertain "whether any, and if any, how much of what was so offered for probate, be the will of the decedent." Only one year in which to contest by bill in equity is allowed, subject to exceptions as to persons under disability and others similarly situated.

It will thus be seen that Virginia has worked out a perfectly rational system of will contest. If the original probate is be-

⁶⁸ Formerly the law was otherwise but the 1849 Code corrected this discrepancy. See REPORT OF REVISORS OF VIRGINIA CODE (1849) 632.

⁶⁹ Va. Code (1942) §§ 5247, 5249, 5253 to 5261.

fore the court, no one can contest after probate unless he was not a party to the original proceeding. Contest after probate is ordinarily by bill in equity and thus resembles slightly the practice of English equity of framing the issue of will or no will. Only in the case of the probate before the clerk can the same parties have the issue tried *de novo*, and this is obviously because of the inferior judicial qualifications of the clerk.

(b) *West Virginia*. When West Virginia separated from Virginia during the war between the states, it took over pretty largely the Virginia legal system. Since that time, however, modifications have been made in the provisions for will contest, but the resemblance to the parent statutes is very substantial.

The present legislation⁷⁰ provides for either an *ex parte* probate or a probate in solemn form in the county court. A contest before probate may be had in connection with the probate in solemn form if interested parties take the proper steps. The judgment of the county court may be appealed to the circuit court and the issue is then tried *de novo*. The Code also provides for a contest in chancery in the circuit court. A person who is regarded as a party to a probate in solemn form not appealed from or to an appeal with trial *de novo* in the circuit court cannot contest in chancery. Indeed, it would seem that the contest in chancery is only possible if the prior probate has been *ex parte* or if the contestant was omitted as a party to a probate in solemn form or to an appeal in the circuit court.

From this brief summary it is apparent that West Virginia, by making a much greater use of the appeal with trial *de novo* than does Virginia, permits in the ordinary case two trials of the issue will or no will, after due notice to interested parties.

⁷⁰ W. Va. Code (1943) §§ 4061-4072.

(c) *Kentucky*. Kentucky legislation on will contest,⁷¹ which appears to stem from the Virginia legislation of 1785,⁷² presents substantially the same set-up as that of West Virginia. Wills may be probated in the county court, with or without notice to interested parties. There may be a contest before probate in the county court. The judgment of the county court may be appealed to the circuit court with a trial de novo. It is further provided that "Any person interested who, at the time of the final decision in the circuit court, resided out of this state and was proceeded against by warning order only, without actual appearance or being personally served with process, and any other person interested who was not a party to the proceeding by actual appearance or being personally served with process, may . . . by petition in equity, impeach the decision and have a retrial of the question of probate. . . ."⁷³

(d) *Pennsylvania*. An ex parte probate may be had before the register.⁷⁴ A caveat may be filed prior to probate, upon which the register may "issue a precept to either the court of common pleas or the orphans' court" directing a trial of the issue of will or no will.⁷⁵ An appeal with trial de novo may be taken, from the register to the orphans' court, or on the filing of a caveat prior to probate, the register may certify the record to the orphans' court.⁷⁶

(e) *Tennessee*. Probate is in the county court if there is no contest.⁷⁷ If the will is contested before probate, the case

⁷¹ Ky. Rev. Stat. (1944) §§ 394.170 to 394.280.

⁷² See *Case of Wells' Will*, 5 Littell (16 Ky.) 273 (1824); *Dibble v. Winter*, 247 Ill. 243 at 257, 93 N. E. 145 (1910).

⁷³ Ky. Rev. Stat. (1944) § 394.280.

⁷⁴ Pa. Stat. Ann. (Purdon, 1930) t. 20, § 1861. See, also, 2 HUNTER, PENNSYLVANIA ORPHANS' COURT COMMONPLACE BOOK (1939) 1122; REMICK, PENNSYLVANIA ORPHANS' COURT PRACTICE (2d ed. 1932) §§ 15, 23.

⁷⁵ Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 1961.

⁷⁶ Pa. Stat. Ann. (Purdon, 1930) t. 20, §§ 1981, 1982, 2005, 2006.

⁷⁷ Tenn. Code (Michie, 1938) §§ 8099, 8102.

is transferred to the circuit court and there tried.⁷⁸ Presumably an appeal from the decision of the county court with trial de novo in the circuit court would be possible.⁷⁹

(f) *New Jersey*. The complicated probate court organization has been described in another monograph.⁸⁰ It is sufficient to state here the important provisions as to contest.⁸¹ Either the surrogate or the prerogative court has original jurisdiction to probate wills. If a caveat is filed when the will is before the surrogate, the proceeding is removed to the orphans' court. An appeal may also be taken to the orphans' court from the proceeding before a surrogate respecting the probate of a will. In either case, the issue is tried de novo, the orphans' court, however, having the power to certify the question of fact to the circuit court for a trial of the issue.

(g) *Missouri*. Probate must be in the probate court.⁸² There can be no contest until after probate; then the contest takes place in the circuit court.⁸³

B. JURISDICTIONS REQUIRING NOTICE BEFORE PROBATE

For some reason which is not entirely clear at the present time a large number of jurisdictions at an early period abandoned the English plan of an ex parte probate in common form without notice. It may have been because the probate of wills disposing of land was included in the court's jurisdiction, and traditionally the validity of a devise of land had been tested by an action at law which began with notice to the defendant. Or it may have been merely that the American conception of procedure involved the tacit assumption that

⁷⁸ Tenn. Code (Michie, 1938) §§ 8103-8112.

⁷⁹ Tenn. Code (Michie, 1938) §§ 9028, 9033.

⁸⁰ Simes and Basye, "The Organization of the Probate Court in America," 42 MICH. L. REV. 965 at 982 (1944) and p. 405, supra.

⁸¹ N. J. Rev. Stat. (1937) §§ 3:2-20 to 3:2-36.

⁸² Mo. Rev. Stat. Ann. (1942) § 529.

⁸³ Mo. Rev. Stat. Ann. (1942 and Supp. 1945) §§ 538 to 541.

no valid proceeding could be instituted without prior notice to interested parties. At any rate it has come about that slightly over half the states require some sort of notice before a will can be probated.⁸⁴ It is believed that in many instances this change has taken place without a full realization of its relation to legislation permitting contest after probate. In the discussion which follows, the statutes will be summarized with this in mind. We shall begin with New York and shall include a little of the history of its legislation, since the statutes of no other state, unless it be California, have had so much influence in shaping present day will contest legislation.

1. *Contest only before probate*

In two jurisdictions, New York and Massachusetts, the only contest of a will, in the sense herein described, takes place before probate. That is to say, will contest is like any other issue in any trial court; the issue must be made up before trial; thereafter, the remedy is by appeal or, in very extraordinary situations, by some special proceeding to reopen the judgment or decree. As will be pointed out later, the same can be said of a will contest in the more populous areas of Wisconsin; but, since the rule is otherwise in other courts of that state, its provisions for will contest will be considered in another connection.

(a) *New York.* While probate and contest had a long prior history in New York,⁸⁵ the significant elements of the narrative begin with the Revised Statutes of 1828. Prior to that legislation the English system of probate in common and in solemn form was in force.⁸⁶ By the Revised Statutes of 1828 separate provisions were made for the probate of wills

⁸⁴ See 43 MICH. L. REV. 1153 (1945) and p. 269, *supra*.

⁸⁵ See *Matter of Brick's Estate*, 15 Abb. Pr. (N. Y.) 12 (1862); REDFIELD, LAW AND PRACTICE OF SURROGATES' COURTS (2d ed. 1881) 1-18.

⁸⁶ REDFIELD, LAW AND PRACTICE OF SURROGATES' COURTS (2d ed. 1881) 256.

of real and of personal property. In the probate of each kind of will, however, notice prior to the hearing was required. In the case of the will involving real property, the heirs were to be notified; ⁸⁷ in the case of personalty, the widow and next of kin.⁸⁸

The article on probate of wills of personal property also contained this provision: ⁸⁹

“Notwithstanding a will of personal property may have been admitted to probate, any of the next of kin of the testator, may, at any time within one year after such probate, contest the same, or the validity of such will, in the manner herein provided.”

The Code then continued with several sections outlining the procedure for will contest. There was no analogous provision for the contest of the probate of a will involving real property. Presumably this was because such probate was not conclusive as to the due execution of the will. The Revisers' notes give the following explanation for the provision concerning will contest: ⁹⁰

“The preceding sections, from section 32 inclusive, are new; they are prepared in order to provide for a case which may often occur, and for which it is at least questionable whether there is any provision by the existing law. The notice previous to proving a will is necessarily short, and must often be inadequate to apprise all of the parties interested, and yet it would seem that when once admitted to proof, the probate is perfectly conclusive; vide Phillip's Evidence, 1 vol. p. 245. In England, a practice prevails in the ecclesiastical courts, of permitting a second and more solemn proof, by the citation of the parties at the instance of a relative. Vide 2 Phillimore, 224. But there it has the effect of suspending

⁸⁷ 2 N. Y. Rev. Stat. (1829) Part 2, c. 6, t. 1, art. 1, §§ 8 and 9, at p. 57.

⁸⁸ 2 N. Y. Rev. Stat. (1829) Part 2, c. 6, t. 1, art. 2, § 24, at p. 60.

⁸⁹ 2 N. Y. Rev. Stat. (1829) Part 2, c. 6, t. 1, art. 2, § 30, at p. 61.

⁹⁰ 3 N. Y. Rev. Stat. (2d ed. 1836) p. 630, “Original note on § 32 to 48,” in which this statement appears.

all the proceedings of the executors; a result much to be deprecated. We have adopted that practice, with many modifications, fitted to our situation, and we propose to limit the time for re-examination, so as not to interfere with the payment of legacies, which cannot be required until one year after probate. In the case of a will of real estate, the proof is not so conclusive as of personal property, but the heir may contest it in a suit at law. The reason would seem equally to apply to a will of personal estate, so far as to provide some summary mode, by which he may contest it."

It is thus apparent that the New York legislation, by requiring notice prior to a hearing on probate of the will, and permitting a contest after probate, had in effect provided for two probates in solemn form.

In *Collier v. Idley's Ex'rs*,⁹¹ Surrogate Bradford explains this anomaly by saying that the original plan was to permit only next of kin who were out of the jurisdiction, and therefore not personally served, to contest after probate; but that the legislature broadened the contest provision so as to make it available to all interested parties. His language is as follows:

"Though the practice of proving wills in common form has prevailed in other portions of the United States; and though it was customary in the State of New York, previous to the revision of the statutes, to prove wills of personalty in that manner, still, it was not usual to require a new proof of the will in solemn form, on the demand of the next of kin. And yet the probate was conclusive. To remedy this difficulty, the first step was to provide for notice to the next of kin on the original proof of the will. (2 R. S., p. 60, § 24.) . . . Still, personal service of the citation was requisite, only on those who could be served in the county of the Surrogate, and next of kin not personally served, might be cut off by constructive notice by advertisement. To meet this case, the Revisers reported to the Legislature a series of provisions, designed to

⁹¹ 1 Bradf. Surr. 94 (1849).

allow proof of the will in solemn form at the call of any of the next of kin, *upon whom a citation to attend the probate had not been personally served.* (See *Original Section*, § 36.)

. . . It is evident that the statute, as reported to the Legislature, was an adoption of the system of proof in Solemn Form, in the case of such of the next of kin as had not been cited. . . . But the Legislature determined to make the statute much broader, and while they retained all the features of the English practice, as reported by the Revisers, they extended the benefit of the statute to all the next kin, whether they had been regularly cited on the original probate or not, the clause limiting the right to file allegations to those who had *not* been personally cited, being stricken out, and the section enacted as it now stands.”

While there were some amendments,⁹² this general type of will contest was retained until after the turn of the century. In 1900 the New York Commissioners of Statutory Revision, in their report of that year on “General Procedure,” recommended, not an elimination of the requirement of notice for the initiation of a probate proceeding, but the repeal of the provisions permitting contest after probate. Their reasons are expressed in the following words:⁹³

“The commissioners think that the unreversed decree of the surrogate admitting a will to probate should be conclusive everywhere until modified, or reversed on appeal. We think the general rule should apply here as in other cases, namely, to furnish a tribunal in which one trial of the issues involved in a probate proceeding may be had, and that the suitors or

⁹² In 1837 the separate provisions for notice of probate of a will of real and of personal property were repealed, and a group of sections covering notice for both types of wills was substituted. See N. Y. Laws 1837, c. 460. In general as to will contest in 1881, see REDFIELD, LAW AND PRACTICE OF SURROGATES’ COURTS (2d ed. 1881) c. 8. In 1892 a provision for contest in the Supreme Court after probate of a will of real or personal property was enacted. N. Y. Laws 1892, c. 591. See this section, as amended in N. Y. Code of Civ. Proc. (Parker, 3d ed. 1903) § 2653a. Provisions for a contest after probate in the Surrogates’ Court were repealed by N. Y. Laws 1910, c. 578.

⁹³ 2 ANNUAL REPORT OF THE COMMISSIONERS OF STATUTORY REVISION OF NEW YORK (1900) 216.

persons interested should not be given two tribunals with alternative or cumulative jurisdiction; that is, suitors should not be permitted to use one court, and if dissatisfied or if they neglect their rights in that tribunal, go into another tribunal and try the same issues which were or might have been tried in the first. . . . Under the plan proposed any contestant may if he wishes submit the issues to the surrogate, or if he prefers, he may have the issues tried by a jury; and we think that when the issues are so tried and finally determined and settled, the adjudication should be final and conclusive; and there should not be any other opportunity to try the same issues, unless a new trial is ordered. . . . The will once admitted to probate under the plan suggested ought to be conclusive, and the estate ought not to be subjected to the uncertainty of a possible application for revocation. Ample provision is made for obtaining a new trial."

In spite of this forceful argument against the double trial of the issue of will or no will, it was not until the legislative session of 1914 that all provisions for contest after probate were repealed.⁹⁴ While an appeal from the decree was allowed, and the introduction of new evidence was permissible, it was in the nature of an equity appeal and not a trial of the issues *de novo*.⁹⁵

Under the present New York legislation,⁹⁶ the will can be contested at or before the close of testimony taken on behalf of the proponent, but apparently not later than that time. The original proceeding is always initiated with notice. A decree does not affect the right or interest of a person not notified as provided in the code.

It thus appears that New York eventually arrived at quite as rational a system of will contest as Virginia, whose history we have previously examined on this point, but of a very dif-

⁹⁴ N. Y. Laws 1914, c. 443. See particularly § 2617 thereof.

⁹⁵ See JESSUP-REDFIELD, *LAW AND PRACTICE IN THE SURROGATES' COURTS* (ed. of 1925) § 189; Taft, "Comments on Will Contest in New York," 30 *YALE L. J.* 593 at 601 (1921).

⁹⁶ N. Y. Surr. Ct. Act, §§ 141, 147-149.

ferent sort. Briefly stated, it is this: the requirement of notice before probate is imposed; but there can be no contest after probate. Therefore, the trial of the issue of will or no will can only occur once.

(b) *Massachusetts*. The story of the development of the Massachusetts probate system has been so well presented by Professor Atkinson⁹⁷ that little need be added here. Although the statutes are not explicit, it appears that the practice in Massachusetts is to give notice of the proceeding to probate a will when the petition is filed.⁹⁸ It has, doubtless, long been the rule that contest takes place before probate.⁹⁹ But prior to 1920, there was an appeal from the decision of the probate court which constituted a trial de novo before a single justice of the Supreme Judicial Court.¹⁰⁰ At the present time, however, appeals from the decision of the probate court probating or rejecting a will are heard as equity appeals before the Supreme Judicial Court.¹⁰¹ It is true, the probate court may have the issue of will or no will tried before a jury in the superior court, but this appears to be merely because it is inconvenient for the probate court to call a jury and not because the case is being transferred to a higher court.¹⁰²

2. *Contest before and after probate in same court*

In a very considerable number of states, the legislatures appear to have modified the old procedure for probate in common and solemn form by requiring notice to interested parties before any probate at all. Thus, the principal reason

⁹⁷ Atkinson, "The Development of the Massachusetts Probate System," 42 MICH. L. REV. 425 (1943).

⁹⁸ See NEWHALL, SETTLEMENT OF ESTATES (3d ed. 1937) § 28; MOTTLE, MASSACHUSETTS PRACTICE (1942) § 31.

⁹⁹ See NEWHALL, SETTLEMENT OF ESTATES (3d ed. 1937) § 30, and cases therein cited; Mass. Rev. Stat. (1836) c. 83, § 47.

¹⁰⁰ See Mass. Rev. Laws (1902) c. 162, § 25.

¹⁰¹ Mass. Ann. Laws (1932) c. 215, § 9 and following. See Mass. Gen. Acts, 1919, c. 274.

¹⁰² Mass. Ann. Laws (1932) c. 215, § 16.

for contest after probate under the English system,—namely that interested parties had no notice of the first probate,—is gone. And it is not easy to find a satisfactory reason for the retention of the contest after probate.

(a) *The California group.* The states whose legislation on will contest presents the greatest amount of similarity are those which follow the pattern found in California. Without doubt this was influenced by some stage of development of the New York legislation already described, yet it presents a form and content all its own. The legislation of eleven states may fairly be classed in this group, namely: Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming. As legislation in three of these, North and South Dakota and Oklahoma, presents certain common characteristics, their statutes will be discussed together after the others are considered.

(b) *California.* In 1850, the year in which California became a state, its legislature passed "An Act to regulate the Settlement of the Estates of Deceased Persons."¹⁰³ This legislation constitutes the beginning of the present California law of will contest. Prior to that time the Mexican law of wills and administration was in force.¹⁰⁴ This Act consisted of fourteen chapters, the second of which was entitled "Of the Proof of Wills." Important features of this chapter, for our purpose, are as follows: no distinction is made between wills of real and of personal property; notice by publication, and by citation, prior to the hearing on the probate of a will, was provided for;¹⁰⁵ the will could be contested before probate by filing written grounds of opposition.¹⁰⁶ Without doubt the legislation was influenced by that in force in New York.

¹⁰³ Cal. Stat. 1850, c. 129.

¹⁰⁴ *Castro v. Castro*, 6 Cal. 158 (1856); *Coppinger v. Rice*, 33 Cal. 408 (1867).

¹⁰⁵ Cal. Stat. 1850, c. 129, §§ 13-15.

¹⁰⁶ Cal. Stat. 1850, c. 129, § 20.

This is particularly indicated by the section dealing with contest after probate, which is as follows:¹⁰⁷ "When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same, or the validity of the will. For that purpose he shall file in the Court before which the will was proved, a petition in writing, containing his allegations against the validity of the will, or against the sufficiency of the proof, and praying that the probate may be revoked."

A revised "Act to Regulate the Settlement of the Estates of Deceased Persons" was passed in 1851,¹⁰⁸ but, so far as the law of will contest is concerned, its changes were not significant. An amendment in 1855¹⁰⁹ provided for a jury trial of will contests.

The California Code of Civil Procedure of 1872, still following, in general, the scheme of the enactment of 1850 as to will contests, presents elaborate provisions for contest before probate in a separate article.¹¹⁰ The contestant is specifically declared to be the plaintiff and the petitioner the defendant.¹¹¹ The petitioner may demur or answer and issues of fact which may be raised are stated. Another article of seven sections¹¹² entitled "Contesting Will After Probate" is chiefly a rearrangement of materials contained in the Act of 1851.

In 1929,¹¹³ the provision permitting any interested person to contest after probate was changed so that such a contest could be instituted only by "any interested person, other than a party to a contest filed before probate pursuant to section 1312 of this code and other than a person who had actual notice of contest thereunder in time to have joined therein."

¹⁰⁷ Cal. Stat. 1850, c. 129, § 30.

¹⁰⁸ Cal. Stat. 1851, c. 124.

¹⁰⁹ Cal. Stat. 1855, c. 110.

¹¹⁰ Cal. Code Civ. Proc. (1872) §§ 1312 to 1318.

¹¹¹ Cal. Code Civ. Proc. (1872) § 1312.

¹¹² Cal. Code Civ. Proc. (1872) §§ 1327-1333.

¹¹³ Cal. Stat. 1929, c. 495.

The period for contest after probate was, by the same act, reduced from one year to six months.

In 1931 the provisions for will contest appear as a part of a Probate Code in a chapter entitled "Contests of Wills,"¹¹⁴ consisting of two articles, one on "Contests before Probate" and one on "Contests after Probate." This chapter has remained practically unchanged since that time.¹¹⁵

At the present time, as in prior legislation, two will contests are possible, although the first as well as the second is instituted with notice. But this anomaly is mitigated to a large extent by the provision enacted in 1929 denying a second contest to those who were parties to the first contest or who had actual notice in time to participate. The most significant sections of the present legislation on will contest, for the purposes of this discussion, are as follows:¹¹⁶

"Sec. 370. Any person interested may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate, and thereupon a citation shall be issued directed to the heirs of the decedent and to all persons interested in the will, including minors and incompetents, wherever residing, directing them to plead to the contest within thirty days after service of the citation, which shall be made personally or by publication in the manner provided by law for the service of summons in civil actions. Any person so served may demur to the contest upon any of the grounds of demurrer available in civil actions. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding ten days, within which to amend his contest. If the demurrer is overruled, the petitioner and others interested, within ten days after the receipt of written notice thereof, may jointly or separately answer the contest."

"Sec. 371. On the trial, the contestant is plaintiff and the petitioner is defendant. Any issue of fact involving the com-

¹¹⁴ Cal. Prob. Code (Deering, 1931) Div. 3, c. 2, §§ 370-385.

¹¹⁵ Cal. Prob. Code Ann. (Deering, 1944) §§ 370 to 385.

¹¹⁶ Cal. Prob. Code Ann. (Deering, 1944) §§ 370, 371 and 380.

petency of the decedent to make a last will and testament, the freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will, must be tried by a jury, unless a jury is waived as provided by the Code of Civil Procedure. If no jury is demanded, the court must try and determine the issues joined."

"Sec. 380. When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, at any time within six months after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate be revoked."

(c) *Arizona*. The Arizona statutes on contest¹¹⁷ follow closely the language of the California statutes of 1872 and are obviously copied from them. The separate provisions for contest before and after probate are set out as in the California statutes. The time for contest after probate is one year with additional time for persons under disabilities.¹¹⁸ Arizona did not adopt the California amendment of 1929 restricting the parties who can contest after probate.¹¹⁹ According to one section¹²⁰ of the Arizona Code, any interested person may contest after probate. Indeed, in *Estate of Biehn*¹²¹ the proponent of the will was permitted to contest

¹¹⁷ Ariz. Code (1939) §§ 38-210 to 38-212, 38-216 to 38-221.

¹¹⁸ Ariz. Code (1939) §§ 38-216, 38-221.

¹¹⁹ This is now Cal. Prob. Code Ann. (Deering, 1944) § 380, and provides that "any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein" may contest after probate.

¹²⁰ Ariz. Code (1939) § 38-216.

¹²¹ 41 Ariz. 403, 18 P. (2d) 1112 (1933).

after probate. But according to another section,¹²² it may be inferred that, if a person *sui juris* contested before probate, in person or by an attorney of his own selection, he would be estopped to contest after probate.

(d) *Idaho*. Idaho provisions on contest¹²³ are almost the same as those contained in the California Code of Civil Procedure of 1872, except that the time for contest after probate is shorter.¹²⁴ Like Arizona, they do not include the California amendment of 1929, which limits the persons who can contest after probate where there has been a contest before probate. Under the Idaho code, an appeal from the probate court to the district court is *de novo* unless it is an appeal on a question of law alone and the error appears on the face of the record.¹²⁵ Thus it appears that it is possible to have three trials of the issue of will or no will, although notice to interested parties precedes each of them.

(e) *Utah*. The Utah provisions¹²⁶ follow closely the California Code of Civil Procedure of 1872, although some of the provisions of the latter on will contest are omitted. Contest after probate is limited to "any person who has not contested a will, or who has contested by attorney appointed by the court without his knowledge." The time limit for con-

¹²² Ariz. Code (1939) § 38-208: "Any person interested may appear and contest the will by himself or by his guardian or attorney, appointed by himself or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so represented, if commenced within the time provided for the contest of wills after probate. . . ." And see *Estate of Cunningham*, 54 Cal. 556 (1880), interpreting a provision in the California Code similar to this.

¹²³ Idaho Laws Ann. (1943) §§ 15-210, 15-213 to 15-217, 15-223 to 15-229.

¹²⁴ According to Idaho Laws Ann. (1943) § 15-223, the time is four months after probate. But compare Idaho Laws Ann. (1943) § 15-229, which seems to refer to a period of eight months after probate with a saving clause as to persons under disability.

¹²⁵ Idaho Laws Ann. (1943) § 11-406. See, also, *Lemp v. Lemp*, 32 Idaho 393, 184 P. 222 (1919).

¹²⁶ Utah Code (1943 and Supp. 1945) §§ 102-3-7 to 102-3-13.

test after probate was reduced from one year after probate to six months in 1943.¹²⁷

(f) *Montana and Wyoming*. The provisions for will contest in Montana¹²⁸ and Wyoming¹²⁹ follow very closely the California Code of Civil Procedure of 1872. In Wyoming, however, the period for contest after probate is six months after probate, and there is no extension of time for persons under disabilities.

(g) *New Mexico*. While the New Mexico legislation on will contests¹³⁰ shows the influence of the California Code of Civil Procedure of 1872, it also shows marked variations. Probate is with notice in the probate court.¹³¹ A contest before probate may take place in that court.¹³² But if that court finds against the will, the case is then removed to the district court and tried de novo, "the same as on appeal."¹³³ A finding favorable to the will in the probate court may be contested in that court at any time within six months, by "any person interested."¹³⁴ Appeal to the district court from a decision of the probate court approving or disapproving a will is permitted to "any party aggrieved."¹³⁵ This appeal is with a trial de novo.¹³⁶ It is evident that, under this legislation, it is possible to have three trials of the issue of will or no will.

(h) *Nevada*. The recently enacted Nevada legislation on will contests¹³⁷ follows closely the language of the California probate code of 1931. However, there are important vari-

¹²⁷ Utah Code (Supp. 1945) § 102-3-12.

¹²⁸ Mont. Rev. Code (1935) §§ 10029, 10032-10038, 10042-10048.

¹²⁹ Wyo. Rev. Stat. (1931) §§ 88-601 to 88-607, 88-701 to 88-707 (amended Laws 1945, c. 3 and 52).

¹³⁰ N. M. Stat. (1941 and Supp. 1945) §§ 32-208 to 32-220. Many of the sections were first enacted in New Mexico Laws 1889, c. 90.

¹³¹ N. M. Stat. (1941) § 32-204.

¹³² N. M. Stat. (1941) § 32-209.

¹³³ N. M. Stat. (1941) § 32-210. And see, also, § 32-214.

¹³⁴ N. M. Stat. (1941) § 32-212.

¹³⁵ N. M. Stat. (1941) §§ 32-215, 32-216.

¹³⁶ N. M. Stat. (1941) § 19-1001.

¹³⁷ Nev. Comp. Laws (Supp. 1941) §§ 9882.18 to 9882.27.

ations. It is expressly provided that the attorney general, and also a devisee or legatee under a former will, may contest before probate.¹³⁸ The time limit for contest after probate is three months after the will was admitted to probate,¹³⁹ and there is no saving clause for persons under disabilities as in the corresponding California legislation.¹⁴⁰ Like the California probate code, this legislation permits a contest after probate only by "any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein."¹⁴¹

(i) *The Dakota sub-group.* Three states, North Dakota, South Dakota and Oklahoma, have statutes on will contest which follow closely the language of the California Code of Civil Procedure of 1872, but which also have some important variations in common. The Dakota Revised Codes of 1877¹⁴² follow the familiar pattern of the California Code of 1872, with a group of sections entitled "Contesting probate of wills" followed by a group on "Probate of foreign wills," after which is found the subdivision on "Contesting will after probate." Two important departures from the California pattern, which are still retained by the three states referred to, are as follows. Contest, both before and after probate, is tried by the court and not by a jury.¹⁴³ Contest after probate is permitted only on a showing of "evidence discovered since the probate of the will."¹⁴⁴ The present Oklahoma statutes¹⁴⁵ follow somewhat more closely than do those of the

¹³⁸ Nev. Comp. Laws (Supp. 1941) § 9882.18.

¹³⁹ Nev. Comp. Laws (Supp. 1941) §§ 9882.22, 9882.26.

¹⁴⁰ Cal. Prob. Code (Deering, 1931) § 384.

¹⁴¹ Nev. Comp. Laws (Supp. 1941) § 9882.22. This clause is the same as that contained in Cal. Prob. Code (Deering, 1931) § 380.

¹⁴² Dakota Probate Code (1877) §§ 19, 22-27, 31-37.

¹⁴³ Dakota Probate Code (1877) §§ 22, 34.

¹⁴⁴ Dakota Probate Code (1877) § 31.

¹⁴⁵ Okla. Stat. (1941) t. 58, §§ 29, 41-46, 61-67. Trial by the court is provided for by §§ 41, 64. The requirement that the contest after probate be based on newly discovered evidence is contained in § 61.

two Dakotas the language of the Dakota Revised Codes of 1877.

The present North Dakota and South Dakota legislation¹⁴⁶ on will contests shows some rearrangement and rewording, but on the whole differs but slightly from that found in the Revised Codes of 1877.

It should be noted that, in North Dakota, South Dakota and Oklahoma the order admitting or denying probate of a will can be appealed to the trial court of general jurisdiction and the case can there be tried *de novo*.¹⁴⁷ Thus, although the statutes on will contest might lead one to suppose that a second trial of the issue is permitted only if there is newly discovered evidence, in fact a second trial is permitted by the device of an appeal with trial *de novo*.

(j) *Other states in this class.* In three other jurisdictions, namely Colorado,¹⁴⁸ the District of Columbia¹⁴⁹ and Iowa,¹⁵⁰ the general plan of permitting a will contest both before and after probate in the same court is followed, although probate is always preceded by notice to interested parties. The Colorado and District of Columbia statutes expressly provide for the caveat and look a little like the system of probate in common and in solemn form with the addition of notice in all cases to precede probate. In Colorado, in addition to contest before and after probate in the county court, an appeal with trial *de novo* to the trial court of general jurisdiction is

¹⁴⁶ N. D. Rev. Code (1943) §§ 30-0601 to 30-0613; S. D. Code (1939) §§ 35.0301 to 35.0312.

¹⁴⁷ N. D. Rev. Code (1943) § 30-2623; Okla. Stat. (1941) t. 20, § 275 and t. 58, § 735; S. D. Code (1939) § 35.2111.

¹⁴⁸ Colo. Stat. (1935) c. 176, §§ 50, 51, 54 to 56, 63 to 65. The right to contest after probate is limited to persons who were not summoned by actual service of process and who did not appear at the probate. As to appeal with trial *de novo*, see Colo. Stat. (1935) c. 176, § 243.

¹⁴⁹ D. C. Code (1940) §§ 19-308 to 19-312.

¹⁵⁰ Iowa Code (1939) §§ 11863-11867, 11882, and see § 11007. The contest after probate is apparently a suit to set aside the will. See 1 MCCARTY, IOWA PROBATE (1942) § 318.

permitted. Texas legislation may also be classified here.¹⁵¹ There is an express provision for contest before probate. There is also a provision to the effect that, when a will has been probated, a proceeding may be instituted to annul its provisions. Another statute limits the period within which a contest can be instituted to four years after the will is admitted to probate. It is further provided that a suit to cancel a will for forgery or fraud may be instituted within four years after the discovery of the forgery or fraud. It would seem that the proceeding to annul a will is broader than an ordinary proceeding to contest. Texas, however, also recognizes the appeal from the county court to the district court with trial *de novo*. If we regard this appeal as the will contest, we should classify Texas legislation at a later point.

3. *Contest in a higher court after probate*

Three states come under this general classification, although they present substantial differences among themselves. They are Alabama, Illinois and Ohio.

¹⁵¹ Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3315. "Any person interested in an estate may, at any time before any character of proceeding is decided upon by the court, file opposition thereto in writing. . . ."

As to notice before probate, see Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3333.

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 3433 provides that "When a will has been probated, its provisions and directions shall be specifically executed, unless annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate. . . ."

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 5534 provides that "Any person interested in any will which shall have been probated under the laws of this State may institute suit in the proper court to contest the validity thereof, within four years after such will shall have been admitted to probate, and not afterward."

Tex. Civ. Stat. Ann. (Vernon, 1939) art. 5536 provides that an interested person "may institute suit in the proper court to cancel a will for forgery or other fraud within four years after the discovery of such forgery or fraud. . . ."

To the effect that there is a trial *de novo* on an appeal from the county court to the district court, see Tex. Rules Civ. Proc. (Supp. 1944) Rule 334.

That the proceeding to annul is broader than the ordinary will contest, is indicated in *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543 (1890); *Walker v. Irby* (Tex. Civ. App. 1920), 229 S. W. 331, rev'd in (Tex. Comm. App. 1922), 238 S. W. 884; *Mason v. Brown* (Tex. Civ. App. 1944), 182 S. W. (2d) 729. To the effect that art. 3433, quoted above, refers to the same subject matter as art. 5534, *supra*, see *Cryer v. Duren* (Tex. Civ. App. 1942), 164 S. W. (2d) 752.

(a) *Alabama*. The scheme for will contest in Alabama resembles somewhat the Virginia provisions already described.¹⁵² However, unlike Virginia, the Alabama legislation provides for notice prior to probate of the will in all cases.¹⁵³ Contest before probate¹⁵⁴ may take place if written objections to the probate of the will are filed in the probate court. On the filing of such objections "an issue must be made up, under the direction of the court, between the person making the application, as plaintiff, and the person contesting the validity of the will, as defendant; and such issue must, on application of either party, be tried by a jury." Any interested party who has not contested the will may, at any time within six months after the will has been admitted to probate, contest it by bill in equity in the circuit court.¹⁵⁵ It is further provided that¹⁵⁶ "The circuit court may, in such case, direct an issue to be tried by a jury, and on the trial before the jury, or hearing before the circuit judge, the testimony of the witnesses reduced to writing by the judge of probate, according to section 42 of this title is evidence to be considered by the judge or jury."

It is noticeable that Alabama still retains the two trials of the issue of will or no will, in spite of the fact that notice of the first hearing as well as the second is always given. It is true, a person cannot contest after probate, if he has done so before probate, but the mere fact that he was a party to the first proceeding, or a witness, does not preclude him from contesting after probate.¹⁵⁷ In *Knox v. Paull*¹⁵⁸ the court

¹⁵² See *Johnston v. Glasscock*, 2 Ala. 218 at 237 (1841).

¹⁵³ Ala. Code (1940) t. 61, §§ 48-50.

¹⁵⁴ Ala. Code (1940) t. 61, § 52. And see § 63, which provides for a transfer of the contest to the circuit court.

¹⁵⁵ Ala. Code (1940) t. 61, § 64. An extension of time is given to persons under disabilities, t. 61, § 66.

¹⁵⁶ Ala. Code (1940) t. 61, § 67.

¹⁵⁷ *Breeding v. Grantland*, 135 Ala. 497, 33 So. 545 (1902); *Knox v. Paull*, 95 Ala. 505, 11 So. 156 (1891).

¹⁵⁸ 95 Ala. 505 at 509, 11 So. 156 (1891).

sought to defend the anomaly of two trials of the same issue of fact in these words: "Good reasons may be suggested for affording this additional opportunity to contest the validity of a will which has been regularly admitted to probate after due notice to all parties in interest. The application to prove the will usually follows close upon the death of the testator. The application comes on for hearing as soon as the short prescribed terms of notice have expired. It must frequently happen that persons interested in the proceeding are wholly unable, while it is pending, to inform themselves as to the instruments offered for probate, or of the circumstances attending its execution. Facts affecting its validity may be developed afterwards, and the failure to discover them, or to obtain the evidence to prove them, may have been without the fault or any lack of diligence on the part of those interested in making a contest."

(b) *Illinois*. Illinois, like Kentucky, took over the Virginia plan of contest in chancery.¹⁵⁹ It, however, added not only a provision for an appeal to the trial court of general jurisdiction with trial *de novo*, but also a requirement of notice for the initiation of the first probate.¹⁶⁰ Under an earlier form of the Illinois statute it was held that a contestant could carry on one contest by appeal from the probate court decision and another at the same time by bill in chancery. And he might also move to have the probate in the county court set aside.¹⁶¹ Apparently much the same thing is possible

¹⁵⁹ *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166 (1887); *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145 (1910).

¹⁶⁰ The provision for notice seems to have appeared in 1897. See Ill. Laws 1897, p. 304. As to the present provision, see Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 216.

¹⁶¹ See *Wright v. Simpson*, 200 Ill. 56, 65 N. E. 628 (1902); *Buerchner v. Buerchner*, 317 Ill. 401, 148 N. E. 274 (1925); 1 HORNER, PROBATE PRACTICE AND ESTATES (4th ed. 1940) § 89.

under the probate code of 1939,¹⁶² although the contest is not called a contest in chancery. At the present time there may be a contest in the county or probate court before probate solely on the ground of "fraud, forgery, compulsion, or other improper conduct which in the opinion of the probate court is deemed sufficient to invalidate or destroy the will."¹⁶³ Otherwise there is a statutory contest after probate in the circuit court.¹⁶⁴ An appeal from the decision of the probate court with trial de novo is still possible.¹⁶⁵

(c) *Ohio*. In Ohio there can be no contest until after probate. The will is probated in the probate court after notice.¹⁶⁶ Then the statute provides for a contest within six months in the common pleas court.¹⁶⁷ This proceeding is with trial de novo.¹⁶⁸ There can be no appeal, however, from the order of the probate court admitting the will to probate, since that is not regarded as a final order.¹⁶⁹

4. *Contest before probate; appeal with trial de novo in a higher court*

One of the most numerous groups of states is that in which the proceeding to probate is initiated with notice and, in terms, contest is permitted only before probate; but in fact by permitting an appeal with trial de novo in the trial court of general jurisdiction a contest after probate in a higher court is

¹⁶² *Handley v. Conlan*, 342 Ill. 562, 174 N. E. 855 (1931); 1 HORNER, PROBATE PRACTICE AND ESTATES (4th ed. 1940) § 89.

¹⁶³ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 221; 1 HORNER, PROBATE PRACTICE AND ESTATES (4th ed. 1940) § 66.

¹⁶⁴ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 242.

¹⁶⁵ Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, §§ 223, 484 and 487.

¹⁶⁶ Ohio Gen. Code (Page, Supp. 1945) § 10504-17.

¹⁶⁷ Ohio Gen. Code (Page, 1937 and Supp. 1945) §§ 10504-32 and 10504-

33.
¹⁶⁸ Ohio Gen. Code (Page, 1937 and Supp. 1945) §§ 12079 to 12085.

¹⁶⁹ *In re Estate of Frey*, 139 Ohio St. 354, 40 N. E. (2d) 145 (1942). But there is an appeal to the common pleas court with trial de novo from an order of the probate court denying probate, if there was no record taken at the hearing in probate. See Ohio Gen. Code (Page, Supp. 1945) § 10501-56.

recognized. Besides the states already mentioned in other groups which superimpose the device of an appeal with trial de novo, the following jurisdictions may fairly be classified here; Connecticut,¹⁷⁰ Kansas,¹⁷¹ Maine,¹⁷² Michigan,¹⁷³ Minnesota,¹⁷⁴ Nebraska,¹⁷⁵ Rhode Island,¹⁷⁶ Vermont¹⁷⁷ and Wisconsin.¹⁷⁸ In Michigan, the probate may not only be appealed to the trial court of general jurisdiction, but the case may be transferred to that court as soon as the heirs file a contest and before the will has been probated.¹⁷⁹ As has been said, Wisconsin only in part comes within this classification. In its more populous areas, the appeal is direct to the supreme court and is on the record.¹⁸⁰ If we do not regard the Texas proceeding to annul a will as a contest after probate, Texas might well be classified here.¹⁸¹

V. THE RATIONALE OF THE WILL CONTEST

From the foregoing survey of will contest legislation, in which a few glimpses of historical development are interspersed, the legislative trends should be apparent. Many of our legislatures appear to have approached the problem on the assumption that the contest after probate in the manner of the

¹⁷⁰ Conn. Gen. Stat. (1930) § 4884; trial de novo, § 5624.

¹⁷¹ Kan. Gen. Stat. (Supp. 1943) §§ 59-2220 to 59-2225; trial de novo, § 59-2408 (amended by Laws 1945, c. 237).

¹⁷² Me. Rev. Stat. (1944) c. 141, §§ 5 to 8; trial de novo, c. 140, § 37.

¹⁷³ Mich. Stat. Ann. (1943) §§ 27.3178(90) to 27.3178(94); trial de novo, § 27.3178(42).

¹⁷⁴ Minn. Stat. (1941) §§ 525.23 to 525.241; trial de novo, § 525.72.

¹⁷⁵ Neb. Rev. Stat. (1943) § 30-217; trial de novo, § 30-1606.

¹⁷⁶ R. I. Gen. Laws (1938) c. 572, § 7; trial de novo, c. 573, §§ 1, 4.

¹⁷⁷ Vt. Pub. Laws (1933) § 2763; trial de novo, § 3016 (amended Laws 1941, No. 42).

¹⁷⁸ Wis. Stat. (1943) §§ 310.04 to 310.06; trial de novo, § 324.03 (on appeal to circuit court from county court in counties of less than 15,000 population).

¹⁷⁹ Mich. Stat. Ann. (1943) § 27.3178(36).

¹⁸⁰ Wis. Stat. (1943) § 324.01. In these more populous counties, the contest may be removed from the county court to the circuit court for trial when a jury is demanded. Wis. Stat. (1943) § 324.17, subd. 8.

¹⁸¹ See note 151, *supra*.

probate in solemn form is an accepted legal device, without realizing why that is true. They thereupon took that device and amended it, by adding a requirement of notice for the original probate or by permitting an appeal with trial *de novo*, so that the resulting product allowed, not one trial after notice, but two, and in some instances even three, trials of the issue of will or no will. In a few isolated instances,—notably in the case of New York and Virginia,—we find an eventual return to the norm of one trial of the issue. In still other states the pattern apparently is based on the assumption that the issue of will or no will is like any other issue; that notice must be given to interested parties prior to probate and then any contest must take place before probate. But to this perfectly rational conception of the will contest is commonly added the appeal with trial *de novo* in the trial court of general jurisdiction.

Taking up in order the types of will contest legislation in accordance with the preceding survey, it is clear that a rational basis exists for those which follow the pattern of the English probate without notice, first, because estates commonly need the supervision of the executor immediately on the death of the testator; and, second, because in the vast majority of cases there is not the remotest possibility of a contest and the probate of the will can be reduced to an administrative formality. But since the heir then has no opportunity to contest before probate, he must be given that opportunity afterward.

Moreover, the same reasons would justify a contest in chancery after probate where no notice is given for the initial probate. The fact that it is in chancery may be explained on the ground that a more competent tribunal is needed for a contested than for an uncontested probate; and that if the heir wishes to have a contest after probate in such a tribunal, he may do so. Parenthetically, it should be pointed out, however, that the resemblance of this device to the framing of

the issue of *devisavit vel non* in English chancery in the case of litigation over the title to devised land is largely superficial. Unlike the English historical counterpart, the American contest in chancery is commonly in rem and is a part of the original probate proceeding.¹⁸²

Where the proceeding is initiated with notice, we must seek a different rationalization. It is true, the Alabama court¹⁸³ suggested that, even with notice before probate, the time prior to the hearing would be so short that little opportunity would be afforded to the heirs to ascertain facts on which a contest could be based. However, it is difficult to see why that should be so. The facts existing at the time of the execution of the will or at the testator's death are just as readily ascertainable as the facts involving a suit relative to the execution of a contract or deed. And the action with respect to the contract or deed may be tried just as speedily after notice as the suit for the probate of a will. Thus it would seem that in those jurisdictions, such as the California group, where there may be contest both before and after probate, there is no satisfactory basis for contest after probate. It is largely an historical survival of probate in solemn form, the reason for which disappeared when probate with notice to interested parties was required.

It is true, in several states of the California group, the same person cannot initiate a contest both before and after probate. Thus, in California, in order to contest after probate, it must appear that the contestant was not a party to the first contest and did not have actual notice of it in time to participate.¹⁸⁴ There is nothing in this statute, however, which bars an heir from contesting after probate where he had notice before probate but there was no contest. In the Dakota

¹⁸² See Simes, "The Administration of a Decedent's Estate as a Proceeding in Rem," 43 MICH. L. REV. 675 at 679 and 688 to 691 (1945), and pp. 494 and 506 to 509, *supra*.

¹⁸³ See note 158, *supra*.

¹⁸⁴ See p. 716, *supra*.

group the opportunity to contest after probate is further limited by the requirement of showing of "evidence discovered since the probate of the will."¹⁸⁵ It would look as if the contest after probate in this group of states could be justified on the ground that its operation is about as restricted as the motion for a new trial in a civil action. However, in all three states of the Dakota group, legislation permits an appeal with trial de novo as well as a contest after probate. This appeal is objectionable on the grounds hereafter to be pointed out.

Is there any justification for the contest after probate, in jurisdictions which require notice before probate, if that contest is in a higher tribunal? And is there any justification in such jurisdictions, for an appeal with trial de novo in a higher tribunal? It would seem that the answer to these questions is the same. Doubtless the reason for the appeal with trial de novo in the trial court of general jurisdiction is the same as that for the typical provision for appeal from the judgment of a justice court. The legislature has very little confidence in the competency of the judge; he might be a layman, and rules of law might be disregarded; if anybody objects, his case can be tried before a judge who is learned in the law. The same explanation could be given for the jurisdictions which permit a proceeding called a contest in a higher tribunal. In either type of contest, it would seem that the retrial of the issue in the higher court is unjustified, if it can also be tried in the probate court. That is to say, if the probate judge is not competent to preside over a contested probate, he ought not to be allowed to do so at all. If he is competent, then the case does not need to be tried anew in another court.

It should be pointed out that the Ohio provisions for contest are distinguishable and are perfectly rational. There the will is admitted to probate in the probate court on notice, and

¹⁸⁵ See p. 721, *supra*.

the contest can take place only after probate and only in the common pleas court. A lay judge may be competent to handle an uncontested probate though he could not properly preside over a will contest case. Hence, the Ohio legislation provides for an uncontested probate in the probate court, and a contest in the common pleas court. But one criticism of this plan may be suggested: in theory it gives an advantage to the proponent of the will as against the contestant for the contestant must always oppose an already probated will. But it is believed that this advantage is more theoretical than actual.

What types of will contest legislation, then, will stand the test of rational analysis? From the foregoing discussion, we may conclude that there are essentially three. First, in jurisdictions which permit probate without notice, contest can take place after probate, either in the same or in another tribunal, if initiated by persons who had no notice of the first probate. But the addition to this pattern of an appeal with trial *de novo* is without justification. Second, in jurisdictions which require notice to interested parties before probate and which permit contest before probate, there is no reason for contest after probate either by that name or in the guise of an appeal with trial *de novo*. Such a jurisdiction should regard the issue of will or no will just like any issue raised in a civil action; it must be raised before trial and determined by the judgment or decree. Third, the Ohio pattern of an uncontested probate in the probate court and a contest in the common pleas court only after probate is perfectly rational in that it recognizes that the common pleas court is competent to try a contest but that the probate court is not.

VI. THE FUNCTION OF CONTEST AFTER PROBATE IN RELATION TO CERTAIN SPECIFIC PROBLEMS

A considerable body of litigation has arisen involving this question: What is the relation of contest after probate to the

prior proceeding for probate of the will? Is it like an appeal? Is it like a proceeding to vacate a judgment? Is it a proceeding in rem like the original proceeding to probate? Is it in fact a part of the proceeding to probate and not an independent proceeding? Of course, in jurisdictions where the contest is an appeal with trial de novo, the character of the proceeding is in part determined by its name: it is an appeal and for most purposes, therefore, is a part of the original proceeding to probate. Indeed, as to most types of contest, it is commonly held that the contest is in rem and is for most purposes a part of the original proceeding to probate.¹⁸⁶

However, the function and character of the contest after probate cannot be determined in a vacuum. It must be considered in the light of its application to concrete problems which have faced the courts. We shall, therefore, examine some of these problems in order to ascertain whether they throw light on our analysis of the function of contest after probate.

1. *Federal jurisdiction arising from diversity in citizenship*

The Federal Code provides¹⁸⁷ that the district courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, . . . between citizens of different states" where the matter in controversy is within the jurisdictional amount. It likewise provides¹⁸⁸ for the removal to the federal district courts, by a non-resident defendant, of "any suit of a civil nature, at law or in equity" of which the federal district courts have original jurisdiction. It is uniformly held that a proceeding to probate a will, or to administer the estate of a decedent, is not a suit of a civil nature at common law or in equity within the meaning of these stat-

¹⁸⁶ See note 182, *supra*.

¹⁸⁷ Fed. Code Ann., t. 28, § 41.

¹⁸⁸ Fed. Code Ann., t. 28, § 71.

utes.¹⁸⁹ The reason doubtless is that Congress contemplated the various English tribunals in which suits were once tried,—chancery, common law courts, ecclesiastical courts, and admiralty courts,—and that, in this historical classification, the ordinary function of the ecclesiastical tribunal in probating wills was regarded as outside the purview of suits at common law or in equity. While the meaning of these terms is not wholly tied down to the historical English division of jurisdiction, it is clear that history determined once and for all that a proceeding in the nature of a hearing in an English ecclesiastical court to determine whether a will should be admitted to probate is not within the jurisdiction of the federal district courts. ♥

Hence, our question is this: Is the proceeding to contest a will to such an extent ancillary to, a part of, or the same as, the proceeding to probate the will that the federal courts will likewise refuse to take jurisdiction? The answer, of course, depends upon the nature of will contests in the particular state. In general, the federal decisions indicate that the will contest cannot be tried in the federal courts unless it is a proceeding independent of the proceeding to probate the will and unless it is *inter partes*. The precise meaning of this test will be clarified by consideration of four leading decisions of the Supreme Court of the United States relative thereto.

*Gaines v. Fuentes*¹⁹⁰ involved the removal, on grounds of diverse citizenship, of a suit brought in the courts of Louisiana to annul a will as a muniment of title to real estate. Mr. Justice Field, speaking for the majority of the court, expressed the view that the jurisdiction of federal courts in removal cases was more extensive than their original jurisdiction where diverse citizenship was involved, and concluded that this case could be removed solely on the ground of diversity of citizen-

¹⁸⁹ *Sutton v. English*, 246 U. S. 199 at 205, 38 S. Ct. 254 (1918).

¹⁹⁰ 92 U. S. 10 (1875).

ship and without regard to the character of the controversy. He, however, went on to indicate that the federal courts would have had original jurisdiction. He observed: "The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony." He conceded that the federal courts have no original probate jurisdiction to establish wills. "The reason lies," he said, "in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists." Three justices dissented on the ground that the proceeding was essentially to revoke the probate of the will, and that the jurisdiction of the federal courts in removal cases was limited by their original jurisdiction in cases between citizens of different states. It is to be noted that, whatever the scope of the removal statute may have been at that time, it was modified in 1887 so that its scope was thereafter limited, in most situations, in the same way as the court's original jurisdiction.¹⁹¹

In *Ellis v. Davis*,¹⁹² a bill in equity was instituted in the federal court of Louisiana to recover possession of real estate and to set aside a will which had been admitted to probate by

¹⁹¹ The earlier statute permitted removal of "any suit of a civil nature at law or in equity . . . where the matter in dispute exceeds . . . and arising under the Constitution or laws of the United States . . . or in which the United States shall be plaintiff or petitioner, or *in which there shall be a controversy between citizens of different states*," but limited original jurisdiction to "suits of a civil nature at common law or in equity" involving federal questions. 18 Stat. L. 470, §§ 1, 2 (1875). In 1887 the removal statute expressly limited removal to cases over which the federal courts are given original jurisdiction. 24 Stat. L. 553, § 2 (1887). See the discussion of these statutes in *In re Cilley* (C. N. H. 1893), 58 F. 977.

¹⁹² 109 U. S. 485, 3 S. Ct. 327 (1883).

the state courts of Louisiana. On a demurrer, the bill was dismissed. This decision was affirmed by the Supreme Court of the United States. The basis of the decision was merely that, under Louisiana law, there is no jurisdiction in equity to revoke a probate and that the proper proceeding is by an action of revendication, which could be brought in the federal court. The Court pointed out that, under the English practice, the validity of wills involving real estate could be determined as to a particular piece of land by an action of ejectment; and that in jurisdictions where this action is still permissible to determine the validity of a will, it could doubtless be instituted in the federal court, provided diversity of citizenship exists. The court further observed, however, that in many states the probate of wills involving land had been given conclusive force until set aside and that "In states where it is held to have a conclusive force, formal modes are prescribed of contesting the validity of the instrument as a will, and of the regularity and legality of the probate, by suits regularly instituted solely for that purpose, and *inter partes*; but such proceedings are generally regarded as the exercise of probate jurisdiction, even if administered in courts other than that of original probate, but the judgment, as in other cases *inter partes*, binds only parties and privies."

In *Farrell v. O'Brien*,¹⁹³ a bill in equity was filed in the federal court to enjoin distribution under a will probated in the state of Washington on the ground that the will was not validly executed. The court determined that the suit, if considered as a Washington proceeding to contest the will, could not be brought in the federal court. The test laid down was as follows: "That where a state law, statutory or customary, gives to citizens of the State, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States

¹⁹³ 199 U. S. 89, 25 S. Ct. 727 (1905).

in administering the rights of citizens of other States or aliens will enforce such remedies." The court then inquired what was meant by the expression "action or suit *inter partes*," and concluded that "the words referred to must relate only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding, that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect." The court then pointed out that if the requirement of an independent suit were not imposed, all *inter partes* proceedings to contest a will could be removed to the federal court. It should be observed that in the state of Washington, probate and contest are in the trial court of general jurisdiction. Yet the court stated that, under the Washington law, the contest was "special in character" and the decree revoking a will already admitted to probate would "inure not only to the benefit of the particular contestant," but was "operative as to the whole world."

In *Sutton v. English*,¹⁹⁴ the federal court was held to be without jurisdiction of a bill in equity to set aside a will probated in Texas, where the requisite diversity of citizenship existed. The court stated the rule thus: "By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem*, matters of this character are not within the ordinary equity jurisdiction of the federal courts; . . . that where a State, by statute or custom, gives to parties interested the right to bring an action or suit

¹⁹⁴ 246 U. S. 199, 38 S. Ct. 254 (1918).

inter partes, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate. . . ." The court then determined that the Texas proceeding in the district court to contest a will was essentially a proceeding to review by appeal or certiorari and was supplemental to the original probate proceeding.

What these decisions appear to mean is this: A proceeding to determine whether a will should be admitted to probate is not a civil suit at law or in equity. Any proceeding after probate, which is ancillary to the original probate proceeding is so much a proceeding to probate that it likewise cannot be within the federal jurisdiction based on diversity of citizenship. But if it is an independent proceeding, and if it is *inter partes*, and if it is in the court of law or of equity, then it may be within the federal jurisdiction. The court seems to have wavered with respect to its meaning of the term "*inter partes*." Does it mean that the proceeding is not in rem? Or does it mean that there are parties who are contesting and that the suit is not *ex parte*? It would seem that the latter is meant. If it is, then every will contest, whether before or after probate, is *inter partes*, since there are parties who are opposing each other, even though its judgment operates in rem. Thus the court is compelled to limit the jurisdiction to those suits *inter partes* which are independent proceedings.

Parenthetically it should be observed that the court apparently assumes that, even though the proceeding operates in rem, the diversity of citizenship requirement can be met. Of course, a formal argument could be made to the effect that, since all persons in the world are parties, it can never be true that all the plaintiffs will be citizens of different states from all the defendants. But it is believed that, if the point were

raised, the court would have to conclude that "parties" for this purpose does not mean all persons bound by the judgment, but merely those actively participating in the litigation or named and served as parties.¹⁹⁵

It should further be pointed out that the requirement of an independent proceeding is not a generalization as to all federal jurisdiction based upon diversity of citizenship. Doubtless there are situations outside the probate field where the reverse might be held.¹⁹⁶ Apparently what is meant is that, unless we lay down the requirement of an independent proceeding, we bring all will contest cases within the federal jurisdiction, and since it is clear that this was not the legislative purpose, we must lay down this special restriction as to will cases.

Our final question is: How may we classify the various types of contest after probate? Are they excluded from the federal jurisdiction by the rule which the Supreme Court of the United States has laid down? As to the contest on an appeal with trial de novo, the decision in the case of *Sutton v. English*, supra, in which that type of contest was discussed, makes it clear that it is not removable. Moreover, a contest which is in the nature of probate in solemn form, or of a statutory proceeding to contest in the same court as that in which the original probate was had, would seem, under the decision in *Farrell v. O'Brien*, supra, with respect to the Washington procedure, to be outside the federal jurisdiction. Decisions of lower federal courts denying jurisdiction as to one or the other of these varieties of contests are found with respect to

¹⁹⁵ See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 25 S. Ct. 251 (1905), in which a statutory proceeding to take land by eminent domain was held removable; *New Orleans v. Gaines' Adm'r*, 138 U. S. 595, 11 S. Ct. 428 (1891), involving a representative suit in which the court said that "representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent, — such as executors, administrators, guardians, trustees, receivers, etc."

¹⁹⁶ See *Boom Co. v. Patterson*, 98 U. S. 403 (1879).

contest proceedings in Arkansas,¹⁹⁷ Indiana,¹⁹⁸ Pennsylvania,¹⁹⁹ New Hampshire,²⁰⁰ Maine,²⁰¹ and Mississippi.²⁰² In the federal court for Georgia,²⁰³ the jurisdiction of the federal court was recognized in a removal of an appeal with trial de novo on probate in solemn form in the superior court. But a later decision²⁰⁴ as to a Georgia contest denied removal where there had been no probate but only a caveat in the court of ordinary for the purpose of securing probate in solemn form. Moreover, decisions of the federal courts with respect to Iowa²⁰⁵ and Oregon²⁰⁶ contest procedure recognize federal jurisdiction; but they, like the earlier Georgia case, were decided before the decision of the Supreme Court in the case of *Farrell v. O'Brien* emphasized the requirement that the contest must be an independent proceeding. Where the contest consists of a statutory proceeding either at law or in equity in a higher court which is a court of general jurisdiction, the lower federal decisions show a still greater conflict. It is held that a contest under Virginia²⁰⁷ or Ohio²⁰⁸ procedure is not removable; but that a contest under Illinois²⁰⁹ or New York²¹⁰ procedure is removable. Decisions as to the Missouri procedure are in conflict;²¹¹ but the most recent is in favor of permitting removal to the federal court. However, all these

¹⁹⁷ *Wahl v. Franz* (C. C. A. 8th, 1900), 100 F. 680.

¹⁹⁸ *Copeland v. Bruning* (C. C. Ind. 1896), 72 F. 5.

¹⁹⁹ *In re Aspinwall's Estate* (C. C. Pa. 1897), 83 F. 851.

²⁰⁰ *In re Cilley* (C. C. N. H. 1893), 58 F. 977.

²⁰¹ *Thompson v. Nichols* (D. C. Me. 1919), 254 F. 973.

²⁰² *In re Armistead's Estate* (D. C. Miss. 1933), 4 F. Supp. 606.

²⁰³ *Brodhead v. Shoemaker* (C. C. Ga. 1890), 44 F. 518.

²⁰⁴ *Meadow v. Nash* (D. C. Ga. 1918), 250 F. 911.

²⁰⁵ *Wart v. Wart* (C. C. Iowa 1902), 117 F. 766. The court termed the Iowa contest proceeding an "original proceeding."

²⁰⁶ *Richardson v. Green* (C. C. A. 9th, 1894), 61 F. 423.

²⁰⁷ *Guilfoil v. Hayes* (C. C. A. 4th, 1936), 86 F. (2d) 544.

²⁰⁸ *Reed v. Reed* (C. C. Ohio 1887), 31 F. 49.

²⁰⁹ *Williams v. Crabb* (C. C. A. 7th, 1902), 117 F. 193.

²¹⁰ *McDermott v. Hannon* (D. C. N. Y. 1913), 203 F. 1015.

²¹¹ Not permitting removal: *Oakley v. Taylor* (C. C. Mo. 1894), 64 F. 245; permitting removal: *Sawyer v. White* (C. C. A. 8th, 1903), 122 F. 223.

decisions, except that concerning the New York procedure, were rendered prior to *Farrell v. O'Brien*, supra. The New York decision, rendered just after *Farrell v. O'Brien* was decided, is concerned with a procedure not now existing in New York.²¹²

In conclusion, it is reasonably clear, on the one hand, that contest by appeal with trial de novo, or by probate in solemn form, is regarded as a part of the original probate for purposes of federal jurisdiction based on diversity of citizenship. It would seem, also, that the usual statutory contest proceeding whether it be brought in the same court in which the probate proceeding was initiated, or in a higher court, is sufficiently a part of the original probate that the federal courts would not take jurisdiction.²¹³ Certainly, the fact that a statutory contest is brought in the trial court of general jurisdiction or in chancery does not make the case removable on the ground of diversity of citizenship.²¹⁴ On the other hand, the practically obsolete contest of a will by means of an action at law in the nature of ejectment, which is purely inter partes and has no operation in rem, could doubtless be tried in the federal courts in a proper case. And the peculiar Louisiana proceeding to annul probate, which seems to resemble that procedure, is likewise within the federal jurisdiction.²¹⁵ Doubtless, a case such as *Creek v. Laski*,²¹⁶ in which a legatee sued an heir in a tort action for wrongfully destroying an unprobated will, could be tried in the federal court on grounds of diversity of citizenship, though the due execution of the will is in issue. While, as has been seen, the federal decisions indicate that

²¹² Since 1914, contest after probate has not existed in New York. See p. 713, supra.

²¹³ This seems to be the import of the observation of the court, already quoted, in *Ellis v. Davis*, 109 U. S. 485 at 496, 3 S. Ct. 327 (1883).

²¹⁴ In re Armistead's Estate (D. C. Miss. 1933), 4 F. Supp. 606; *Guilfoil v. Hayes* (C. C. A. 4th, 1936), 86 F. (2d) 544.

²¹⁵ *Fakouri v. Cadais* (C. C. A. 5th, 1945), 147 F. (2d) 667.

²¹⁶ 248 Mich. 425, 227 N. W. 817, 65 A. L. R. 1113 (1929).

there is still some uncertainty about the statutory contest proceeding brought in a higher court than that in which the probate was initiated, it is believed to be a reasonable deduction from the decisions of the Supreme Court of the United States on this subject to say this: In most states in which a proceeding to contest after probate exists, the action cannot be tried in the federal court on grounds of diversity of citizenship, because it is a part of the original proceeding to probate the will.

2. *Who has the affirmative of the issue?*

One question which we shall raise, only to discard, as an aid in determining the character of contest after probate, is this: Who is plaintiff in such a contest? Who has the affirmative of the issue will or no will? The answer to this question should aid us in determining who has the right to open and close; who has the burden of proof; and what is the relation between the original probate and contest after probate. Frequently the matter comes up in connection with instructions or rulings on burden of proof. Of course, general questions, such as whether or not mental incapacity or undue influence are affirmative defenses, are not relevant here. The only question which is related to the nature of the contest after probate is this: Is there a different rule as to the burden of proof in a contest after probate as compared with a contest before probate? Concededly, the proponent, in the absence of a statute to the contrary, would have the affirmative of all issues which are not matters of affirmative defense, and the true burden of proving whatever is necessary to make out a case in a contest before probate. But does he still have that burden in a contest after probate? Is he still the plaintiff, or is the contestant the plaintiff? The answer in the cases is confusing and unsatisfactory. Often, we are not told whether burden of proof means burden of going forward with the evidence, or

the true burden of proof which Professor Wigmore has referred to as the risk of non-persuasion.²¹⁷ Moreover, discussions of burden of proof commonly make no distinction between the situations before and after probate. Furthermore, statutes in a number of states produce a result which is difficult to rationalize.

Conceivably, courts might analyze the contest after probate in either one of two ways. They might say: this is like probate in solemn form; the idea is that the first proof was inadequate and was without notice; hence we should have, as completely as possible, a retrial of the issue and should make it correspond to the original probate as to parties and as to burden of proof. Thus, the proponent would still be the plaintiff and would have the burden of showing the due execution of the will. Or the courts might approach the matter somewhat as follows: the will has already been admitted to probate; any attack on the decree admitting it can be regarded as in the nature of a proceeding to set aside a judgment; hence the contestant is plaintiff and has the burden of proving that the will should be set aside. In so far as it is possible to determine from the decisions, each of these two methods of approach has been followed in a number of jurisdictions.²¹⁸

²¹⁷ 9 WIGMORE, EVIDENCE (3rd ed. 1940) §§ 2485-2489.

²¹⁸ Estate of Hayes, 55 Colo. 340, 135 P. 449 (1913) (contestant has burden of proof on issues raised by him); Wheeler v. Rockett, 91 Conn. 388, 100 A. 13 (1917) (proponent has burden of proof); Mobley v. Lyon, 134 Ga. 125, 67 S. E. 668 (1909) (proponent has burden of proof); Miller v. Blumenshine, 343 Ill. 531, 175 N. E. 814 (1931) (burden of proof does not shift from proponents to contestants); Pepper v. Martin, 175 Ind. 580, 92 N. E. 777 (1910) (contestants have burden of proof); Convey v. Murphy, 146 Iowa 154, 124 N. E. 1073 (1910) (contestant has burden of proof, the contest is an independent action); Taff v. Hosmer, 14 Mich. 309 (1866) (proponent has burden of proof); but see In re Reed's Estate, 273 Mich. 334, 263 N. W. 76 (1935); Isom v. Canedy, 128 Miss. 64, 88 So. 485 (1921) (proponent has burden of proof); Rock v. Keller, 312 Mo. 458, 278 S. W. 759 (1926) (proponent has burden of proof); In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928 (1929) (on appeal with trial de novo, burden of proof is on proponent); Patten v. Cilley, 67 N. H. 520, 42 A. 47 (1893) (proponent has burden of proof); In re Sturtevant's Estate, 92 Ore. 269, 178 P. 192 (1919) (proponent must reprobate the will by original proof); Renn v. Samos, 33 Tex. 760 (1871) (contestant has burden

There seems to be also a third approach found in statements of the courts to the effect that the proponent must make a *prima facie* case by proving formal execution of the will, after which the contestant has the burden of proving all his grounds of contest.²¹⁹ The latter approach is inconsistent with the proposition that the true burden of proof never shifts; and it is not clear that, in the absence of statute, these statements are meant to deny that proposition.²²⁰

A few illustrations will demonstrate how little relation exists between the decisions on such questions as burden of proof and right to open and close and the question of the true function of contest after probate.

In the contest after probate in Missouri, the contestant is referred to as plaintiff and the proponent as defendant. Yet it is held that the proponent has the true burden of proof and the right to open and close.²²¹ On the other hand in Ohio the cases indicate that the contestant has the burden of proof²²² and that "in order to set aside a will the evidence adduced in the case against the will must outweigh both the evidence adduced in favor of the will and the presumption arising from

of proof); *Williams v. Robinson*, 42 Vt. 658 (1870) (on appeal with trial de novo, burden of proof is on proponent, as if the proceeding were commenced in that court); *Dickens v. Bonnewell*, 160 Va. 194, 168 S. E. 610 (1933) (proponent has burden of proof); *In re Estate of McKachney*, 143 Wash. 28, 254 P. 455 (1927) (contestant has burden of proof, as provided by Wash. Rev. Stat. (1932) § 1387); *Kerr v. Lunsford*, 31 W. Va. 659 (1888) (proponent has burden of proof).

²¹⁹ *Fernstrom v. Taylor*, 107 Fla. 490 at 494, 145 So. 208 (1933); *May v. May*, 175 Ga. 693, 165 S. E. 617 (1932); but see *Mobley v. Lyon*, 134 Ga. 125, 67 S. E. 668 (1909); *In re Estate of Wallace*, 158 Kan. 633, 149 P. (2d) 595 (1944); *Brehony v. Brehony*, 289 Pa. 267, 137 A. 260 (1927); see also cases under the California type of statute, discussed *infra*. See annotation, 76 A. L. R. 373.

²²⁰ To the effect that the burden of proof may be said to shift in certain exceptional situations, see Morgan, "Some Observations Concerning Presumptions," 44 HARV. L. REV. 906 (1931).

²²¹ *Morrow v. Board of Trustees of Park College* (Mo. 1944), 181 S. W. (2d)

945.

²²² *McFarland v. Clark*, 8 Ohio App. 326 at 331 (1918). In general, see cases to this effect cited in DEIBEL, OHIO PROBATE LAW (1936) 622.

the order of the probate court admitting the will to probate as the valid last will and testament of the testator.”²²³ Yet the Ohio statutes on will contest include the following provision:²²⁴ “The party sustaining the will shall be entitled to open and close the evidence and argument. He must offer the will and probate, and rest. The opposite party then shall offer his evidence; the party sustaining the will then must offer his other evidence. Rebutting evidence may be offered as in other cases.” While this statute is primarily concerned with the burden of going forward with the evidence, it would seem also to indicate a view as to the party who has the affirmative of the issue, which is hard to reconcile with some of the judicial pronouncements.

One would suppose that, where contest after probate consists in probate in solemn form, the proponent would always have the affirmative of the issue. In South Carolina the proponent is the petitioner and presumably would have the burden of proof,²²⁵ but the Maryland court has indicated that the caveator is plaintiff.²²⁶ In Virginia the court has held that the burden is on the proponent in a proceeding on the issue *devisavit vel non*,²²⁷ it being suggested that the analogous English proceeding to determine title to land in an action of ejectment would place the burden on the devisee.

The most extraordinary situation is found in California and other states which have enacted similar provisions as to will contests. A provision found in the codes of these states is to the effect that “the contestant is plaintiff and the petitioner is defendant.”²²⁸ It should be observed that this provision ap-

²²³ Van Demark v. Tompkins, 121 Ohio St. 129 at 133, 167 N. E. 370 (1929).

²²⁴ Ohio Gen. Code (Page, 1937) § 12085.

²²⁵ Mordecai v. Canty, 86 S. C. 470, 68 S. E. 1049 (1910).

²²⁶ Townshend v. Townshend, 7 Gill. (32 Md.) 10 (1848).

²²⁷ Dickens v. Bonnewell, 160 Va. 194, 168 S. E. 610 (1933).

²²⁸ Cal. Prob. Code Ann. (Deering, 1944) § 371. This section appears in the chapter on contest before probate, but see also Cal. Prob. Code Ann. (Deering, 1944) § 382, providing that proceedings on a contest after probate are to be had “as in the case of a contest before probate.”

plies equally to contest before probate and to contest after probate. Hence, if taken literally one might reach the absurd conclusion that, if no evidence at all were introduced at the contest before probate, the will would in all cases be admitted to probate. In order to avoid such a conclusion, the California courts have held that there are two separate proceedings in the hearing on the will before probate; there is an *ex parte* proceeding in which the proponent has the burden of proof and there is at the same time the contest in which the contestant has the burden of proof. In *Estate of Relph*,²²⁹ the court stated this doctrine in these words: "When a will is contested before probate there are two separate and distinct proceedings pending before the court. One is the petition for the probate of the will; the other is the contest of the probate of the will. . . . The petitioner or proponent appears therein as plaintiff and tenders to all of the world all of the issues of fact relevant to the ultimate question of the validity of the will. While all persons interested in the estate are in a sense parties defendant thereto, there are no defendants in the sense of active parties litigant in this proceeding. It is in a sense an *ex parte* proceeding, in which the burden rests upon the petitioner to prove all the material allegations of his petition. . . . The contest of a will, on the other hand, while a proceeding *in rem*, is at the same time an adversary proceeding. . . . The only issues of fact involved therein are those which are framed by the allegations of the contest and the denials of the answer. . . . As to those issues the burden of proof rests upon the contestants. . . ." Like conclusions are reached by the courts of other states which follow the California type of statute just quoted.²³⁰ It is not easy, however,

²²⁹ 192 Cal. 451 at 458, 221 P. 361 (1923).

²³⁰ *Head v. Nixon*, 22 Idaho 765, 128 P. 557 (1912); *In re Bragg's Estate*, 106 Mont. 132, 76 P. (2d) 57 (1938); *In re Hanson's Will*, 50 Utah 207, 167 P. 256 (1917); *Wood v. Wood*, 25 Wyo. 26, 164 P. 844 (1917) (the Wyoming statute does not state that the contestant is plaintiff). See also 1 BANCROFT'S PROBATE PRACTICE (1928) § 204.

to give a rational explanation of such legislation. As the California court observed in its opinion in *Estate of Latour*,²³¹ "We are unable to see any good reason for our somewhat peculiar statutory provisions so far as a contest before probate is concerned, but we must take the law as we find it."

3. *Effect of prior decree admitting will to probate*

Whether the prior decree admitting the will to probate is to be regarded as competent evidence in a contest after probate is believed to be of some significance in determining the character of that contest. If the contest is to be regarded as essentially a retrial of the issue of will or no will, then the decree on the former hearing would not be admissible. On the other hand, if the contest after probate is essentially a proceeding to set aside a perfectly valid decree, then we may admit that decree as evidence of the due execution of the will. Of course, as pointed out by the North Carolina court,²³² the fact that a statute declares that the decree in the first probate is "conclusive in evidence of the validity of the will" can have application only to a collateral attack on the will and not to the contest after probate, which is a direct attack.

In the absence of statute, courts have generally held that the decree admitting the will to probate is not admissible.²³³ The argument against admitting the decree is particularly strong where the hearing on the original probate was *ex parte* or was without notice to interested parties. As was observed by the North Carolina court,²³⁴ "The proceedings in common

²³¹ 140 Cal. 414 at 421, 73 P. 1070, 74 P. 441 (1903).

²³² *Wells v. Odum*, 205 N. C. 110 at 111, 170 S. E. 145 (1933).

²³³ *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361 (1893); *Davis v. Upson*, 209 Ill. 206, 70 N. E. 602 (1904); *Edwards v. Gaulding*, 38 Miss. 118 (1859) (now overruled by statute); *Wells v. Odum*, 205 N. C. 110, 170 S. E. 145 (1933); *In re Will of Williams*, 215 N. C. 259, 1 S. E. (2d) 857 (1939); *Dickens v. Bonnewell*, 160 Va. 194, 168 S. E. 610 (1933). Contra: *In re Estate of Holloway*, 195 Cal. 711, 235 P. 1012 (1925). See also *Frazie's Executor v. Frazie*, 186 Ky. 613 at 623, 217 S. W. 668 (1919).

²³⁴ *In re Will of Chisman*, 175 N. C. 420 at 421, 95 S. E. 769 (1918).

form before the clerk are *ex parte*, and not binding on the caveators, who were not parties." In a few states statutes expressly provide that the decree admitting the will to probate is evidence to prove the due execution of the will in the contest after probate.²³⁵ Perhaps, also, the California statute making the contestant the plaintiff, may have that effect.²³⁶

The precise question here considered should be distinguished from the question whether the testimony of the subscribing witnesses as given in the original hearing can be introduced in the contest after probate. A number of statutes do allow the admission of such evidence,²³⁷ although most of them restrict it to cases where the witnesses are not available in the proceeding before probate. It is interesting to note that, in at least two states, it has been held that a statute permitting the introduction of the testimony of subscribing witnesses as given on the original probate should not be construed to permit the introduction of the decree admitting the will to probate.²³⁸ The reason apparently was that the contest was a retrial of the issue as far as possible, and that to inform the jury of the decree in the former hearing would be unduly prejudicial to the contestants.

²³⁵ Miss. Code (1942) § 507; Ohio Gen. Code (Page, 1937) § 12083; Wash. Rev. Stat. (1932) § 1387.

²³⁶ In re Estate of Holloway, 195 Cal. 711, 235 P. 1012 (1925).

²³⁷ Ala. Code (1940) t. 61, § 67; Ariz. Code (1939) § 38-212; Ark. Dig. Stat. (1937) § 14539; Cal. Prob. Code Ann. (Deering, 1944) § 374; Idaho Laws Ann. (1943) § 15-217; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 223; Ind. Stat. (Burns, 1933) § 7-602; Ky. Rev. Stat. (1944) § 394.270; Miss. Code (1942) § 508; Mo. Rev. Stat. Ann. (1942) § 541; Mont. Rev. Code (1935) § 10036; Nev. Comp. Laws (Supp. 1941) § 9882.21; N. M. Stat. (1941) § 32-209; N. C. Gen. Stat. (1943) § 31-35; N. D. Rev. Code (1943) § 30-0606; Ohio Gen. Code (Page, 1937) § 12084; Okla. Stat. (1941) t. 58, § 44; S. D. Code (1939) § 35.0304; Utah Code (1943) § 102-3-9; Va. Code (1942) § 5261; Wyo. Rev. Stat. (1931) § 88-606. All of these states except Alabama and Illinois limit the use of such testimony to cases where the witness is unavailable for stated reasons; in these two states, however, the testimony can apparently be used regardless of the availability of the witness.

²³⁸ Craig v. Southard, 148 Ill. 37, 35 N. E. 361 (1893); Dickens v. Bonnewell, 160 Va. 194, 168 S. E. 610 (1933). See also Kay v. Elston, 205 Ala. 307, 87 So. 525 (1920).

4. *Jury trial in contest after probate*

While it is generally held that the constitutional right to jury trial does not include a jury in a will contest,²³⁹ the statutes of a majority of the states do give the right to a jury trial in such a proceeding.²⁴⁰ Sometimes it is provided that a jury trial may be had either in contest before probate or in contest after probate, but not in both contests.²⁴¹ Sometimes, though the provision for contest after probate calls for trial before a court, a jury trial may be had on an appeal with trial de novo.²⁴² In a few states a jury trial cannot be had as a matter of right;²⁴³ and it is interesting to note that among these are

²³⁹ *Cummins v. Cummins*, 1 Marv. (15 Del.) 423, 31 A. 816 (1895); *Wainwright v. Bartlett*, 51 Nev. 170, 271 P. 689 (1928); *Fleming's Estate*, 265 Pa. 399, 109 A. 265 (1919); *State v. Nieuwenhuis*, 49 S. D. 181, 207 N. W. 77 (1926); *Will of Weidman*, 189 Wis. 318, 207 N. W. 950 (1926). See annotation in 62 A. L. R. 82.

²⁴⁰ Ala. Code (1940) t. 61, §§ 52, 63, 67; Ariz. Code (1939) §§ 38-210, 38-211, 38-218; Ark. Dig. Stat. (1937) §§ 14543, 14545; Cal. Prob. Code Ann. (Deering, 1944) §§ 371, 382; Colo. Stat. (1935) c. 176, § 63; Del. Rev. Code (1935) § 3802 (register "shall have power" to order a jury); D. C. Code (1940) § 19-312; Idaho Laws Ann. (1943) §§ 15-213, 15-214, 15-226; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 244; Iowa Code (1939) § 11864; Kan. Gen. Stat. (Supp. 1943) §§ 59-2212, 59-2408 (amended Laws 1945, c. 237) (no jury unless court calls one in an advisory capacity); Ky. Rev. Stat. (1944) §§ 394.260, 394.290; Me. Rev. Stat. (1944) c. 140, § 37 (jury "may" be ordered); Mass. Ann. Laws (1932) c. 215, § 16 (issues "may" be sent to superior court for trial by jury); Mich. Stat. Ann. (1943) § 27.3178(42); Minn. Stat. (1941) § 525.72 (no jury unless court orders one); Miss. Code (1942) § 503; Mo. Rev. Stat. Ann. (1942 and Supp. 1945) §§ 538, 539; Mont. Rev. Code (1935) §§ 10032, 10045; Nev. Comp. Laws (Supp. 1941) §§ 9882.18, 9882.24; N. H. Rev. Laws (1942) c. 365, § 11; N. J. Rev. Stat. (1937) §§ 3:2-31, 3:2-33; N. M. Stat. (1941) § 32-210; N. Y. Surr. Ct. Act, § 147; Ohio Gen. Code (Page, Supp. 1945) § 12082; Okla. Stat. (1941) t. 58, § 735 (discretionary); Pa. Stat. Ann. (Purdon, Supp. 1944) t. 20, § 1961; R. I. Gen. Laws (1938) c. 573, § 4; S. D. Code (1939) § 35.2111; Tenn. Code (Michie, 1938) § 8110; Vt. Pub. Laws (1933) §§ 3003, 3016 (amended Laws 1941, No. 42); Va. Code (1942) § 5257; W. Va. Code (1943) § 4068; Wis. Stat. (1943) § 324.17; Wyo. Rev. Stat. (1931) § 88-602.

²⁴¹ Cal. Prob. Code Ann. (Deering, 1944) §§ 371, 382.

²⁴² S. D. Code (1939) § 35.2111.

²⁴³ Kan. Gen. Stat. (Supp. 1943) §§ 59-2212, 59-2408 (amended Laws 1945, c. 237); *Bell v. Skinner*, 119 Kan. 286, 239 P. 965 (1925); *Maddy v. Hock*, 134 Kan. 15, 4 P. (2d) 408 (1931); Minn. Stat. (1941) § 525.72; Okla. Stat. (1941) t. 58, § 735; *In re DeVine's Estate*, 188 Okla. 423, 109 P. (2d) 1078 (1941).

two states which have recently revised completely their probate codes, namely Minnesota and Kansas.

One may well inquire why the jury trial in will contest cases is so universal in the United States in view of the fact that no such procedure was followed by the English ecclesiastical courts, on which to some extent our probate procedure is modeled. The answer would seem to be that, when wills involving land came to be probated in this country just as wills of personalty, it was felt that the jury trial, which was always assured in an action of ejectment in England to try title to devised land, should be incorporated into our probate procedure. It will be recalled that, though English chancery sometimes compelled heirs and devisees to conduct a contest in a common law court to determine the validity of a devise of land, the chancellor did not undertake to override the institution of jury trial in the common law court. If the jury in the action of ejectment on feigned issues did not reach a result pleasing to the chancellor, he did not undertake to decide the facts himself, but sent the case back to the common law court for another trial by another jury.²⁴⁴

In this country a variety of answers can be made to the question, what kind of jury trial is provided for in a contest. Sometimes the conclusion of the courts is that a common law jury trial has been provided;²⁴⁵ sometimes that a trial before an equity jury is called for and that therefore the verdict is purely advisory.²⁴⁶ It has also been said that the statutory provisions

²⁴⁴ *Pemberton v. Pemberton*, 13 Vesey 290 (1807). After three juries had found in favor of the will, the court refused to direct a fourth trial, saying that if a fourth trial should result in a verdict against the will he would have to direct a fifth trial.

²⁴⁵ *Lambert v. Foley*, 237 Ala. 131, 186 So. 138 (1939); *Estate of Green*, 25 Cal. (2d) 535, 154 P. (2d) 692 (1944); *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227 (1898); *Beatty v. Caldwell*, 210 Ky. 559, 276 S. W. 547 (1925); *Struth v. Decker*, 102 Md. 496 at 500, 62 A. 709 (1906); *Dowling v. Luisetti*, 351 Mo. 514, 173 S. W. (2d) 381 (1943); *Barnes v. Bess*, 171 Va. 1, 197 S. E. 403 (1938) (*devisavit vel non*).

²⁴⁶ *Cummins v. Cummins*, 1 Marvel (15 Del.) 423, 31 A. 816 (1895); *Maddy v. Hock*, 134 Kan. 15, 4 P. (2d) 408 (1931); *Hannon v. Gorman*, 296 Mass.

for jury trial preserve the historical situation just described in which a court of equity sends the issue of *devisavit vel non* to the law court to be tried.²⁴⁷ If that be true, the court may or may not accept the finding of the jury; but if it does not, then the case must be tried before another jury. Essentially, however, it is regarded as a common law jury trial.

One may well conclude that the retention of jury trial as a matter of right in will contests is largely due to historical reasons. But the issues of fact would seem to be of a sort which could better be dealt with by a court than by a jury.

5. *Time limitations on contest after probate*

Statutory provisions limiting the time within which a contest can be initiated are practically universal.²⁴⁸ The time

437, 6 N. E. (2d) 433 (1937); *Wainwright v. Bartlett*, 51 Nev. 170, 271 P. 689 (1928); *In re DeVine's Estate*, 188 Okla. 423, 109 P. (2d) 1078 (1941); *Keller v. Lawson*, 261 Pa. 489, 104 A. 678 (1918); *State v. Nieuwenhuis*, 49 S. D. 181, 207 N. W. 77 (1926); *Redford v. Booker*, 166 Va. 561, 185 S. E. 879 (1936) (distinguishing an issue out of chancery from an action of *devisavit vel non*); *In re Jolly's Estate*, 197 Wash. 349, 85 P. (2d) 267 (1938); *Will of Weidman*, 189 Wis. 318, 207 N. W. 950 (1926).

²⁴⁷ *In re Gleason*, 96 Misc. 397, 160 N. Y. S. 220 (1916); *In re Barlow's Will*, 180 App. Div. 860, 168 N. Y. S. 131 (1917).

²⁴⁸ In the following list the period given is that for contest after probate unless otherwise stated; in states having both contest after probate and appeal with trial de novo, only the former period is given unless otherwise indicated. Ala. Code (1940) t. 61, §§ 64, 66 (six months; and if no contest has been had, infants and persons of unsound mind have 12 months after a guardian is appointed or disabilities removed, but in no case over twenty years); Ariz. Code (1939) §§ 38-216, 38-221 (one year; infants and persons of unsound mind have one year after removal of disability); Ark. Laws 1941, Act 401 (appears in Ark. Dig. Stat. (Supp. 1944) at p. 553) (six months after a probate without notice); Ark. Dig. Stat. (1937) § 14545 (persons not personally served may contest in chancery within three years, and infant not a party to such a suit is not bound until twelve months after attaining majority); Cal. Prob. Code Ann. (Deering, 1944) §§ 380, 384 (six months; infants and persons of unsound mind who were not parties to the proceeding have six months after removal of disability); Colo. Stat. (1935) c. 176, § 65 (a person not summoned on the probate has one year to contest; infants and persons non compos mentis have one year after removal of disability); Conn. Gen. Stat. (1930) §§ 4991, 4992 (amended Supp. 1939, § 1306e) (appeal with trial de novo: one month, or twelve months for persons who had no notice; minors have twelve months after attaining majority); Del. Rev. Code (1935) § 3801 (one year); D. C. Code (1940) § 19-309 (three months for a will of personalty; one year for a will of realty as to persons actually served or per-

limitation for contest after probate designated as such runs from a period under twelve months in most of the states in the California group to seven years in some of the southern states. As might be expected, the period in which a contest

sonally appearing, and two years as to other persons; minors have one year after attaining majority); Fla. Stat. Ann. (1941) § 732.30 (any time before final discharge of the personal representative); Ga. Code (1936) § 113-605 (seven years; minors have four years after attaining majority, but a contest by a minor after the general period of limitation does not affect any rights other than the minor's); Idaho Laws Ann. (1943) §§ 15-223, 15-229 (the first section states a limitation of four months; the second allows eight months, and infants and persons of unsound mind have eight months after removal of disability); Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 242 (nine months); Ind. Stat. (Burns, Supp. 1943) § 7-504 (one year after the will is offered for probate; infants, persons of unsound mind and persons absent from the state have three years after the will is offered for probate); Iowa Code (1939) § 11007, subd. 3 (two years from the time the will is filed in the clerk's office and notice thereof is given; but if after probate the executor causes personal notice of the probate to be served, the limitation is one year after such service); Kan. Gen. Stat. (Supp. 1943) § 59-2404 (amended Laws 1945, c. 237) (appeal with trial de novo: nine months); Ky. Rev. Stat. (1944) §§ 394.240, 394.280 (appeal with trial de novo: five years; a person residing out of the state and proceeded against by warning order only, and a person not having personal service and not appearing, may petition in equity within three years after the decision on appeal; infants have twelve months after attaining majority to bring a similar action; these equity actions operate no further than necessary to protect the rights of the plaintiff); Me. Rev. Stat. (1944) c. 140, § 32 (appeal with trial de novo: twenty days; a person beyond the sea or out of the United States, with no attorney in the state has twenty days after his return or appointment of an attorney); Md. Code (1939) art. 93, § 357 (one year); Mich. Stat. Ann. (1943) §§ 27.3178(36), 27.3178(45) (appeal with trial de novo: twenty days, and court may extend for an additional forty days; a person out of the United States at the time of the decree has three months after his return, if within two years after the decree and administration has not been completed); Minn. Stat. (1941) § 525.712 (appeal with trial de novo: thirty days after service of notice of filing the order appealed from, or six months in the absence of such notice); Miss. Code (1942) § 505 (two years; infants and persons of unsound mind have two years after removal of disability); Mo. Rev. Stat. Ann. (1942 and Supp. 1945) §§ 538, 540 (one year; infants and persons of unsound mind have one year after removal of disabilities); Mont. Rev. Code (1935) §§ 10042, 10048 (one year; infants and persons of unsound mind have one year after removal of disabilities); Neb. Rev. Stat. (1943) § 30-1602 (appeal with trial de novo: thirty days); Nev. Comp. Laws (Supp. 1941) § 9882.22 (three months); N. H. Rev. Laws (1942) c. 351, §§ 7, 9 (one year, if no appeal has been prosecuted; infants, insane persons or those out of the United States have one year after removal of disability); N. J. Rev. Stat. (1937) § 3:2-52 (appeal, which may be de novo: three months, or six months if the appellant resided out of the state at the time of death of the testator); N. M. Stat. (1941 and Supp. 1945) §§ 32-212, 32-215, 32-220 (six months for contest in the probate court; three months for appeal to the district court with trial de novo); N. C. Gen. Stat. (1943) § 31-32 (seven years; minors, insane and imprisoned

may be had in the form of an appeal with trial de novo is usually very short. While it may not at first be entirely apparent why it is true, it would seem that the length of the period in which the contest may be brought has a direct relation to the function of contest after probate. If the period is short, we may expect to have the contest before final distribution in practically all cases. And if, also, the final order of distribution is the significant decree in determining the successors in interest to the title of the decedent, then we can have no questions about the rights of persons claiming under the first probate.²⁴⁹ The contest would be regarded as a com-

persons have three years after removal of disability); N. D. Rev. Code (1943) § 30-0608 (one year); Ohio Gen. Code (Page, 1937 and Supp. 1945) §§ 10504-32, 12087 (six months; persons under disability have six months after removal of disability, but bona fide purchasers not affected); Okla. Stat. (1941) t. 58, §§ 61, 67 (one year; infants and persons of unsound mind have one year after removal of disability); Ore. Comp. Laws (1940) § 19-208 (amended Laws 1945, c. 185) (six months after entry of court order in court journal; persons under disability have six months after removal of disability); Pa. Stat. Ann. (Purdon, 1930) t. 20, § 2005 (appeal with trial de novo: two years, but the court may cite anyone to show cause why he should not appeal within six months from the date of such citation); R. I. Gen. Laws (1938) c. 573, § 1 (appeal with trial de novo: forty days); S. C. Code (1942) § 8932, subd. 3 (one year; infants have one year after removal of disability); S. D. Code (1939) §§ 35.0306, 35.0312 (one year; infants and persons of unsound mind have one year after removal of disability); Tenn. Code (Michie, 1938) §§ 8112, 8574 (seven years; infants and persons of unsound mind have three years from removal of disability); Tex. Civ. Stat. Ann. (Vernon, 1941) art. 5534 (contest: four years); Tex. Rules Civ. Proc., Rule 332 (appeal with trial de novo: fifteen days); Utah Code (Supp. 1945) § 102-3-12 (six months); Vt. Pub. Laws (1933) § 3005 (appeal with trial de novo: twenty days); Va. Code (1942) §§ 5259, 5260 (one year; infants and persons of unsound mind have one year after removal of disability; persons residing out of the state or notified only by publication have two years after the order appealed from); Wash. Rev. Stat. (1932) § 1385 (six months); W. Va. Code (1943) §§ 4071, 4072 (two years; infants, convicts and insane persons have one year after removal of disability; persons residing out of the state or proceeded against by publication have two years after the order appealed from); Wis. Stat. (1943) § 324.01 (appeal with trial de novo in counties under 15,000 population: sixty days); Wyo. Rev. Stat. (1931) §§ 88-701, 88-707 (amended Laws 1945, c. 3 and 52) (six months).

²⁴⁹ Since it is generally the law that the personal representative has title to personalty of the estate, a distribution of personalty by him under a decree admitting a will to probate or ordering distribution of the estate would clearly pass title. If, however, the subject matter in question is land, the heir or devisee would have title. If the order admitting the will to probate is the significant order, a difficult question arises as to whether a bona fide purchaser from the dev-

plete retrial of the issue, and would supersede the decree in the first probate. But no real hardship would result because no decree of distribution would be made prior to the contest. If the period is long, we may still look upon the contest as a retrial of the issue as did the English lawyers with respect to the probate in solemn form in the ecclesiastical courts;²⁵⁰ but, on the other hand, modern demands for a speedy, final distribution are likely to result in having the contest treated as a kind of proceeding to set aside a valid judgment. Thus a bona fide purchaser from a distributee under the original probate may well be protected even though the property involved is land.²⁵¹

One of the most readily discernible trends in will contest legislation is the tendency to shorten the period of limitation. Thus the California type of legislation, which originally provided for a time limitation of one year,²⁵² has been changed to provide for a limitation of six months in California and Utah, and three months in Nevada. Virginia, which at one time imposed a limitation period of seven years,²⁵³ now provides for a period of one year in most cases.

In most of the statutes, the period of limitation is extended for the benefit of persons under a disability, though in a few no such exception exists. Such provisions have been a source of litigation. Some courts have concluded that the revocation of probate on the petition of a contestant who was under a disability after the general limitation period had elapsed would apply only to the person who had been under a dis-

issee is protected, when, on a contest, probate is thereafter revoked. See 36 MICH. L. REV. 120 (1937). If, however, the significant decree which confirms the title of the devisee is the order of distribution, and if contest takes place before the order of distribution, this problem does not arise.

²⁵⁰ In the ecclesiastical courts the period for instituting probate in solemn form was probably thirty years after probate in common form. See note 3, *supra*.

²⁵¹ See 36 MICH. L. REV. 120 (1937) and note 249, *supra*.

²⁵² See note 107, *supra*.

²⁵³ See note 64, *supra*.

ability.²⁵⁴ Thus we would have the surprising conclusion that, though in general the contest proceeding is in rem,²⁵⁵ the will is held valid as to some persons and void as to others. Other courts have reached the more rational conclusion that, if the will is set aside after the general limitation period has expired, it is nevertheless set aside as to all interested persons.²⁵⁶

In discussing time limitations, it should not be overlooked that in many states an after discovered will can be produced after the statutory period of limitation has expired,²⁵⁷ since the probate of the after discovered will is not regarded as a contest within the meaning of the statute. Indeed, in some states the production of an after discovered will is expressly excepted from the operation of the limitation statute.²⁵⁸ Without going into this problem to any extent, it may be observed that the production of an after discovered will should be considered a contest. Since a probate should determine that the instrument is the *last* will of the testator, the probate of a later will is a contest of the first probate. Moreover, no good reason is perceived why the production of an after discovered will should be treated differently from any other after discovered evidence. It is true, wills are frequently concealed and cannot be found at the time of the first hearing, but so is other evidence. In some jurisdictions the contest statute expressly applies to the production of an after discovered will, and the time limitation, therefore, is also applicable.²⁵⁹

²⁵⁴ Security Trust & Savings Bank v. Superior Court, 21 Cal. App. (2d) 551, 69 P. (2d) 921 (1937); Spencer v. Spencer, 31 Mont. 631, 79 P. 320 (1905). See also Ga. Code (1936) § 113-605; Ky. Rev. Stat. (1944) § 394.280.

²⁵⁵ See Simes, "The Administration of a Decedent's Estate as a Proceeding in Rem," 43 MICH. L. REV. 675 at 680 (1945).

²⁵⁶ McCann v. Ellis, 172 Ala. 60, 55 So. 303 (1911).

²⁵⁷ See Appendix note for § 73, p. 275, supra. Abdill v. Abdill, 295 Ill. 40, 128 N.E. 741 (1920); Waters v. Stickney, 12 Allen (94 Mass.) 1, 90 Am. Dec. 122 (1866); In re Elliott's Estate (Wash., 1945) 156 P. (2d) 427.

²⁵⁸ Cal. Prob. Code Ann. (Deering, 1944) § 385; Nev. Comp. Laws (Supp. 1941) § 9882.27.

²⁵⁹ N. D. Rev. Code (1943) § 30-0608; Okla. Stat. (1941) t. 58, § 61; S. D. Code (1939) § 35.0306.

VII. CONCLUSION: IMPROVING AMERICAN TYPES OF CONTESTS; RECOMMENDED LEGISLATION

We have seen that in a considerable number of states the will contest after probate constitutes a procedural anomaly: legislators do not appear to have realized whence it came nor whither it is going. Adapting the English probate in solemn form, they have added provisions for notice before probate and sometimes also provisions for an appeal with trial *de novo* after probate. Thus they have permitted two, or even three, contests although notice to interested parties is given prior to the first contest. In so doing, they appear to have lost sight of the only reason justifying a contest after probate, the absence of notice and the summary character of the first probate.

Whether we should provide for contest after probate in any case will depend, then, upon whether we desire to permit probate without notice. Without going into that issue exhaustively, it is possible to observe that strong arguments do exist for the initiation of probate without notice. It is a procedure which permits an immediate supervision of the estate without the appointment of a special administrator; it saves expense in the vast majority of cases where there is no desire on the part of anyone to contest the will; it is in accord with the present English practice which has been followed in that country for centuries.

By way of summary, it may be suggested that legislation on will contests should accord with the following propositions:

1. If original probate is without notice, then notice to interested parties should immediately follow; and a short period for contest should be permitted.

2. This period should not be extended beyond the time of the final order of distribution.

3. No extension of time should be permitted in the case of persons under disability. After all, they can act through guardians; and it seems unreasonable to hold up the ultimate

determination of title to the estate until after their disabilities are removed.

4. A jury trial should be permitted only in the sound discretion of the court; it should not be a matter of right.

5. The contest after probate should be regarded as a retrial of the issue of will or no will which was presented at the original probate; not a proceeding to set aside a judgment. Thus it will be a part of a single proceeding to probate the will and administer the estate; proponents will have the same burden of proof which they had on the initial probate; evidence introduced at the original probate will only be admitted in exceptional cases where the witnesses cannot be produced to testify anew, or where the proposition to be proved is not controverted by the contestants.

6. The production of an after discovered will should be barred at the time of the decree of distribution just as other grounds of contest.

If these principles are embodied in contest legislation, it will cease to be an amended edition of a procedural institution which is forgotten; and will become merely a device necessitated by the fact that probate is commonly administrative and without notice, and that a trial of the issue of will or no will is the exception and not the rule.

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